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Ballot Fees as Impermissible Qualifications for Federal Office

BALLOT FEES AS IMPERMISSIBLE QUALIFICATIONS FOR FEDERAL OFFICE

MARK R. BROWN*

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INTRODUCTION

BAL'LOT, *n.* [It. *ballotta*; Fr. *ballotte*, a little ball.]

1. originally, a ball used in voting. Ballots were of two colors, white and black, the former being used for an affirmative and the latter for a negative vote.

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2. a preprinted or written ticket, paper, etc., by which a vote is registered.
3. the act or method of voting, especially secret voting by the use of ballots or voting machines.
4. the entire number of votes cast at an election.
5. a list of people running for office; a ticket.¹

Webster's Dictionary reveals that "ballot" has enjoyed several meanings throughout history.² Originally, the term was understood to reference the small white and black balls that registered votes.³ Today, while sometimes used to describe the act of voting, the term more commonly describes the collection of candidates running for office.⁴ Eligible persons who have expressed a sufficient interest in an elected position are said to be "on the ballot."⁵

How one goes about getting "on the ballot" is the focus of this Article. Most states today require that major-party candidates for state and federal offices survive political primaries in order to qualify for general election ballots.⁶ Access to the primary ballot, in turn, is conditioned by most states on the payment of filing fees.⁷ While precise amounts vary, these fees are not often trivial. Federal offices, in particular, are regularly conditioned on fees that reach thousands of dollars.⁸

My thesis is that these ballot fees, when applied to federal elected officials, violate the U.S. Constitution. Specifically, I argue that filing fees for elected federal officials—the President, Senators, and members of the House—violate the Qualifications Clauses found in Articles I and II of the Constitution. According to Article I, Senators and House members need only meet age, state residence, and U.S. citizenship tests.⁹ Article II provides that the President need only meet age, U.S. residence, and United States citizenship tests.¹⁰ None of these federal officials can be required to own property, let alone pay it over to government, in order to qualify for their positions. Filing fees are nothing more than property qualifications.

1. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 143 (2d ed. 1983).

2. *See id.* (demonstrating that the meaning of "ballot," originally thought of as the combination of a white and black ball used for voting, now also denotes a preprinted or written ticket by which a vote is registered, the act or method of voting, the entire number of votes cast at an election, and a list of people running for office).

3. *Id.*

4. *Id.*

5. *Id.*

6. *See infra* notes 158-162 and accompanying text (stating that all but four states have divided the election process into primaries followed by a general election).

7. *See infra* notes 153-195 and accompanying text.

8. *See infra* notes 113-129 and accompanying text.

9. U.S. CONST. art. I.

10. U.S. CONST. art. II.

They not only require property ownership; they divest candidates of the property they own.

Of course, everyone knows that successful political campaigns are expensive. One estimate has successful Senatorial candidates in 2000 spending, on average, over \$7 million on their campaigns.¹¹ Successful House candidates spent, on average, over \$800,000 on their campaigns.¹² Total campaign expenditures for the 469 or so federal offices at stake in 2000, including the presidency, approached \$2 billion.¹³ When compared with the large cash outlays needed to win federal elections, even a \$10,000 fee may seem reasonable.

Fees, moreover, are often charged for public services. Drivers' licenses, marriage licenses, parking meters and toll roads are frequently encountered examples. Even peaceful dispute resolution, one of the foundations of civilized societies, is commonly conditioned on user fees.¹⁴ Simply put, user fees are a regular, some might say necessary, nuisance in the American scheme of government.

Because user fees are ubiquitous and campaigns expensive, my argument might appear ambitious. Convincing skeptics that abandoning ballot fees is useful or constitutionally necessary can prove a difficult task. Money, after all, could still control many (or most) electoral outcomes. Equally obstructive non-monetary mechanisms might also evolve to block commoners from federal ballots.

My naivety does not blind me to these possibilities. However, I am not yet so cynical to believe that these results are inevitable or desirable. Instead, I have to believe that an American political system that remains theoretically open to all candidates is preferable to one that frankly equates money with electoral value. In my mind, the current system is no different from waiving Duke into the Final Four every basketball season. I refuse to believe that a competitive process can be so predictable as to be

11. See JOSEPH E. CANTOR, ELECTIONS 2004: THE STATE OF CAMPAIGN FINANCE, US DEPARTMENT OF STATE'S BUREAU OF INTERNATIONAL INFORMATION PROGRAMS, at [http://usinfo.state.gov/products/pubs/election04/campaign\\$.htm](http://usinfo.state.gov/products/pubs/election04/campaign$.htm) (last visited June 22, 2005) (on file with the American University Law Review) (reporting successful Senatorial campaigns averaging \$7.4 million dollars in expenses).

12. See *id.* (documenting that the average successful House campaign costs \$849,000).

13. *Id.*

14. Both state and federal courts generally charge plaintiffs filing fees before they can proceed to trial. The Supreme Court has found that such fees in civil courts do not violate the federal Constitution. See, e.g., *United States v. Kras*, 409 U.S. 434, 446 (1973) (declaring that filing fees for federal bankruptcy proceedings do not violate the Equal Protection Clause); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (sustaining appellate filing fees for adverse welfare decisions). Only when some other fundamental interest, such as familial rights or basic liberty, is at stake are user fees constitutionally impermissible. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 104 (1996) (holding that a parent is entitled to a free transcript in order to appeal a decision terminating parental rights); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (finding that a criminal defendant is entitled to a free transcript to pursue an appeal).

dispensable, whether on basketball courts, in courts of law, or in the political marketplace. Let everyone play and see who wins. People might be surprised by the outcomes.

This Essay proceeds in four parts. Part I explains the American history of ballots, qualifications, and filing fees. Part II outlines the present structure and legal landscape of ballot fees in the United States. Part III assesses the constitutional problems that surround property qualifications on both sides of the ballot. Part IV then makes use of the history, constitutional debates, and Supreme Court precedent surrounding ballots, qualifications, and electoral fees to present a normative constitutional critique of current law. In sum, I argue that the founding generation did not intend to allow states to add ownership requirements to the qualifications spelled out in Articles I and II. Though it is impossible to say that the Framers rejected ballot fees, one can conclude that ballot fees prove inconsistent with the meaning and spirit of the federal Qualifications Clauses.

I. A BRIEF HISTORY OF QUALIFICATIONS AND BALLOTS

A. *The First Hundred Years*

1. *Ballots*

Colonial America used voice voting and the showing of hands, as well as written ballots, for its collective decision making.¹⁵ For this reason, voting in the colonies “was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some.”¹⁶

To the extent paper ballots were used in the colonies and emerging

15. See *Burson v. Freeman*, 504 U.S. 191, 200 (1992) (stating that “[d]uring the colonial period, many government officials were elected by the viva voce method or by the showing of hands, as was the custom in most parts of Europe”) (citing ELDON EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 1-6 (The Univ. of Chicago Press 1917); JOSEPH HARRIS, THE BROOKINGS INSTITUTION, ELECTION ADMINISTRATION IN THE UNITED STATES 15-16 (1934); JERROLD RUSK, THE EFFECT OF THE AUSTRALIAN BALLOT REFORM ON SPLIT TICKET VOTING: 1876-1908, 8-11 (Univ. of Michigan 1968)). Voice votes were common in the colonies, even when proxy voting by paper ballot was allowed. CORTLANDT F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 140 (Columbia College 1893). Because the common law precluded proxy voting altogether, it was not uncommon for elected bodies in colonial America to be selected by voice vote. *Id.* The choice of written ballots over voice votes in colonial America depended on a combination of geography, philosophy and ownership. *Id.* at 98-99. The New England colonies, which were heavily influenced by Puritan thought, commonly allowed proxy voting, and hence written ballots. *Id.* at 98. Proprietary colonies (Delaware, Pennsylvania and the Carolinas) also used written ballots. *Id.* at 99. New York, Virginia, Georgia, Maryland, and New Jersey, on the other hand, shunned ballots in favor of the system used by the English House of Commons (which did not implement paper ballots until 1872). *Id.* at 98.

16. *Burson*, 504 U.S. at 200.

states, they were not pre-printed by government.¹⁷ Rather, they were produced by the electors themselves, or by someone acting at an elector's behest.¹⁸ One might say that the electoral ballots used by the founding generation of Americans were informal at best.¹⁹ They were not uniform, were not official, did not include lists of candidates, and were not regulated by government.²⁰

By the dawn of the Constitutional Convention, the newly emancipated states had uniformly adopted paper ballots.²¹ Because the transparency of voice voting facilitated bribery and coercion, states discovered that secrecy was important to the integrity of their elections.²² Paper ballots, which could confidentially register votes, thus became the rule in post-Constitution America. Only Kentucky retained voice voting for any prolonged period of time following ratification of the Constitution.²³

Still, the ballots that came into vogue in the latter part of the eighteenth century were not pre-printed by government or official in any sense of the word. Voters simply "marked [their selections] in the privacy of their homes, and then brought them to the polls for counting."²⁴

By the middle of the nineteenth century, as political parties emerged²⁵ and elections became more complex, voters began using "preprinted tickets offered by political parties."²⁶ These pre-printed tickets "were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance."²⁷

Unfortunately, the distinctive nature of these ballots subverted secrecy and facilitated untoward influence in the voting booth.²⁸ In an effort to

17. See generally EVANS, *supra* note 15, at 1-6 (noting that in New England, the use of the paper ballot was not meant to ensure secrecy).

18. See *Burson*, 504 U.S. at 200 (observing that voters handwrote their ballots at home and then brought them to the polls for counting).

19. See generally EVANS, *supra* note 15 *passim* (comparing the voting methods present in the New England, Middle Atlantic, Southern, North Central, and Western states).

20. *Id.*

21. See *Burson*, 504 U.S. at 200 (observing that the opportunities to bribe voters due to the public nature of the *viva voce* system led to its demise).

22. *Id.*

23. See LIONEL E. FREDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM* 20 (Michigan State Univ. Press 1968) ("All but one of the new state constitutions of the era of the Revolution required ballot papers. Kentucky clung to oral voting even after the Civil War, otherwise the system had become general."); see also *Burson*, 504 U.S. at 200 (reporting that most states adopted the paper ballot within twenty years of the formation of the Union).

24. *Burson*, 504 U.S. at 200.

25. See JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 97 (1995) (recognizing Martin Van Buren's political organizing in support of Andrew Jackson's 1828 presidential campaign as the beginning of party politics in the United States).

26. *Burdick v. Takushi*, 504 U.S. 428, 446 (1992) (Kennedy, J., dissenting).

27. *Burson*, 504 U.S. at 200.

28. *Id.* at 200-01.

battle the systemic bribery and coercion that surrounded elections, in 1888 “the Louisville, Kentucky, municipal government, the Commonwealth of Massachusetts, and the State of New York adopted the Australian [ballot] system” to help guarantee ballots’ secrecy.²⁹ As explained by Justice Kennedy in his dissenting opinion in *Burdick v. Takushi*,³⁰ “[s]tate-prepared ballots were considered to be a progressive reform to reduce fraudulent election practices.”³¹ The distinctive pre-printed ballots offered by political parties³² were abandoned in favor of official, identical ballots.³³ Because party operatives could no longer be sure how votes were cast, many abusive party practices, like bribery and coercion, were thus avoided.³⁴ As a result, by 1896, a vast majority of states had turned to pre-printed paper ballots.³⁵ By 1916, the Australian pre-printed paper ballot had become the universal norm throughout the United States.³⁶

The development of pre-printed paper ballots in the latter part of the nineteenth century supplied government its first real opportunity to limit the number of candidates running for office. Qualifications, after all, can only do so much. Indeed, a limited field was an implicit assumption behind the adoption of pre-printed ballots. Following Illinois’s adoption of the Australian ballot in 1891, for example, the Illinois Supreme Court observed that “[i]t is manifest that . . . nominations of candidates whose names shall appear upon the ballot must be regulated in some way, otherwise the whole scheme would become incapable of execution.”³⁷

29. See *id.* at 202-03 (observing that the Australian system was the best way to secure secrecy in elections because it provided for an official ballot containing all the candidates’ names and required polling booths).

30. 504 U.S. 428 (1992).

31. *Id.* at 446 (Kennedy, J., dissenting).

32. *Burson*, 504 U.S. at 200-01.

33. See *id.* at 202-03 (explaining that these ballots contained all the candidates).

34. See *id.* at 202 (explaining that uniform ballots and polling booths introduced by the Australian election reforms helped to ensure secrecy).

35. See *id.* at 204-05 (noting that reform measures taken by several of the states “set off a rapid and widespread adoption of the Australian system in the United States”). “By 1896, almost 90 percent of the States had adopted the Australian system. This accounted for 92 percent of the national electorate.” *Id.* See THE CENTER FOR VOTING AND DEMOCRACY, AS EASY AS 1-2-3: FINAL REPORT OF THE VERMONT COMMISSION TO STUDY INSTANT RUNOFF VOTING, at http://www.fairvotevermont.org/123/c_history.htm (last visited June 22, 2005) (on file with the American University Law Review) (reporting that Vermont began offering official, government-printed ballots that listed all the official candidates in 1892). “The Australian innovation [i.e., official ballot] adopted by Vermont was the use of government-printed ballots that listed all qualifying candidates.” *Id.* Because of rampant illiteracy, southern states tended to lag behind in this reform effort. See FREDMAN, *supra* note 23, at 97 (stating that ten states, “seven of which belonged to the confederacy—Louisiana, Alabama, Georgia, South Carolina, North Carolina, Virginia and Florida,” had not adopted the voting reforms by 1892).

36. See MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788-1997: THE OFFICIAL RESULTS OF THE ELECTIONS OF THE 1ST THROUGH THE 105TH CONGRESSES xxiv (McFarland & Co., Inc. 1998) (stating that the “publicly printed ballot was adopted in some form by all but three states between 1888 and 1916”).

37. *People ex rel. Breckton v. Bd. of Election Comm’rs of Chi.*, 77 N.E. 321, 323 (Ill.

The question that emerged was how to limit the number of candidates whose names would be pre-printed on the new Australian ballots. Most states solved this problem by simply turning it over to the parties. In Illinois, for example, nomination was by party caucus.³⁸ Some states, like Louisiana, added a newly developed alternative that allowed candidates to gain access by gathering voters' signatures.³⁹ Although this alternative allowed fledgling candidates to circumvent party caucuses and conventions, it proved largely useless in practice. Contrary to the Australian (two signatures) and English (ten signatures) models on which it was based,⁴⁰ most states set the "number of names required on the petition . . . impossibly high so that the candidates would be restricted in practice to the nominees of the two major parties."⁴¹ Even Massachusetts, which was regarded as a model by reformers across the United States, "required one thousand signatures for a state-wide office, and at least fifty for a district office."⁴² The Democratic and Republican parties thus tended to control the makeup of official, pre-printed ballots, just as they had effectively controlled the old system by printing ballots themselves. Indeed, candidates wishing a party's endorsement were "often required to pay the party excessive sums to insure that their names would be placed on the ballot . . ."⁴³ For their parts, states consequently exercised little control over whose names were placed on ballots.

2. *Qualifications*

The absence of official paper ballots does not imply a lack of qualifications. Quite to the contrary, the colonies and newly created states frequently imposed qualifications on candidates for office, as well as their electors. Property qualifications, for example, were common in the

1906). See *State ex rel. Labauve v. Michel*, 46 So. 430, 431 (La. 1908) (observing that to properly adopt the Australian ballot system in which "the state prints and distributes the ballots . . . it is indispensable that by some means the names to be put on the ballot should be designated to the officer, or, in other words, that the candidates shall have been nominated").

38. See *Sanner v. Patton*, 40 N.E. 290, 292-93 (Ill. 1895) (explaining that section 14 of the voting act prohibits voters from writing down the names of people who have not been nominated and that the ballot only contains names of persons whom a political party has nominated).

39. See *Labauve*, 46 So. at 432 (noting that Act No. 152 of the voting act of 1898 provided for three ways to be nominated: (a) by convention, (b) "by caucus or other nominating body," and (c) by nominating paper); see also FREDMAN, *supra* note 23, at 73 (observing that in the South, going to the Australian ballot stemmed from "mingled motives of discrimination and reform," which was thought to disenfranchise illiterates, who were primarily African Americans at the time).

40. FREDMAN, *supra* note 23, at 73.

41. *Id.* at 47-48 (calculating the required signatures for state office in Pennsylvania, for example, at one-half of one percent of the "last total vote cast").

42. FREDMAN, *supra* note 23, at 47.

43. *Id.* at ix.

colonies and were eagerly embraced following the American Revolution.⁴⁴ While these restrictions did not always demand outright ownership on the part of electors,⁴⁵ they often did.⁴⁶ Poll taxes placed on electors, though uncommon, were not unheard of either.⁴⁷ Women, slaves, and indentured servants, moreover, were denied suffrage.⁴⁸ Race restrictions on electors

44. This is not to say that the colonies always imposed property restrictions. Virginia's experience, for example, was varied. BISHOP, *supra* note 15, at 70-71. Its constitution and ordinance of 1621 provided that "all inhabitants of the colony were to have a vote in the choice of burgesses." *Id.* at 70. This was the rule for close to thirty years,

until in 1655 a law was passed limiting the franchise to "all housekeepers, whether ffreeholders [sic], leaseholders or otherwise tenants". But in less than a year this statute was repealed, because, said the house of burgesses, "we conceive it something hard and unagreeable to reason that any person shall pay equall [sic] taxes and yet have no votes in elections". It was not long, however, before the harshness of this rule was lost sight of, and the house of burgesses in 1670 . . . [limited the franchise to] only "ffreeholders [sic] and house keepers who are answerable to the publique [sic] for the levies"

Id. at 70-71.

45. Colonial New Jersey, for example, limited its vote to "inhabitants," which included "Freeholder[s], [] Tenant[s] for Years, or Householder[s] & Resident[s]" ALBERT MCKINLEY, *THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA* 257 (Ginn & Co. 1905)(quoting Act of 1766). As a result, non-freeholders were apparently able to vote in at least some local elections during the colonial period. *Id.* "The usual statement, therefore, that the suffrage in New Jersey was limited to freeholders must be qualified in large measure by the admission of householders in certain towns for the provincial suffrage, and householders throughout the whole colony in local elections." *Id.* Similarly, "[t]he suffrage [in Delaware] was extended to all freeholders and to those housekeepers who had resided one year in the borough and hired a house and ground of the yearly value of at least five pounds." *Id.* at 272.

46. See Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 337 (1989):

By the middle of the eighteenth century, all the American colonies save one had adopted property qualifications for the suffrage. Colonists explained the disenfranchisement of the propertyless in their midst in part by observing that such people "had no wills of their own." Under colonial restrictions all the propertyless, regardless of whether they were wage earners or recipients of poor relief, occupied the same political status. After the Revolution, . . . many states began to enfranchise some of those who owned no property, mainly wage earners and leaseholders

Id. (footnotes omitted); see also CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 24 (The Free Press 1986) (1913) (stating that although the extent of disenfranchisement cannot be determined, property qualifications that existed in some states excluded many adult males from voting in elections).

47. See G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 74 (1988) (observing that although they were not regularly employed, the framers of the Constitution permitted and made no effort to invalidate poll taxes on equal protection grounds); 1 FRANCIS NEWTON THORPE, *A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 1776-1850*, 96 (1898) (noting that South Carolina used a poll tax as a substitute for property qualifications); John Victor Berry, Comment, *Take the Money and Run: Lame-Ducks "Quack" and Pass Voter Identification Provisions*, 74 U. DET. MERCY L. REV. 291, 304-05 & n.78 (1997) (observing that the use of poll taxes during revolutionary period was intended to expand the suffrage to men who did not meet the property qualifications).

48. See BEARD, *supra* note 46, at 24 (stating that four groups were disenfranchised due to economic status as a non-freeholder in American society in 1787: (a) slaves, (b) indentured servants, (c) men who did not fulfill the property qualifications found in state constitutions and laws, and (d) women).

were prevalent in the south.⁴⁹

Colonial and Revolution-era representatives were subjected to these same requirements, and more.⁵⁰ In addition to age⁵¹ and residence⁵² requirements, property qualifications⁵³ and religious tests⁵⁴ were common. Unlike suffrage restrictions,⁵⁵ the property requirements imposed on representatives frequently required outright ownership, as opposed to leaseholds and simply keeping “house.” For example, while non-freeholders in New Jersey were sometimes allowed to vote, elected representatives were required to possess a “£500 real and personal estate in that county.”⁵⁶ Indeed, most states required that their local senators possess

49. See BISHOP, *supra* note 15, at 53 (noting that in southern colonies, statutes required race qualifications for voting and in northern colonies, no “law that would prevent an Indian or a negro, if otherwise qualified, from voting in the northern colonies” appeared to exist).

50. See THORPE, *supra* note 47, at 93 (stating that property qualifications for electors “were less exacting than those for office-holders” because “[a] shorter residence and less property were required”).

51. See *id.* at 68-71 (documenting age requirements for members of state houses found in state constitutions from 1776 through 1799). Of the fifteen American states that existed at the turn of the eighteenth century, all except Kentucky required that representatives be twenty-one. *Id.* at 71. Kentucky required that its local House members be twenty-four. *Id.*

52. *Id.* at 68-71 (documenting residence requirements for members of state houses found in state constitutions from 1776 through 1799). A requirement that a male reside in the state for one year was the most common, though states also frequently employed two and three-year requirements. *Id.*

53. Property qualifications for elected representatives to states’ lower houses between 1776 and 1799 provide useful examples. New Hampshire in 1784 required that representatives possess an estate worth one hundred pounds, one half of which had to be a freehold. *Id.* at 68. See also BEARD, *supra* note 46, at 65 (noting that every member of the new Hampshire’s lower house was required to own “an estate ‘of the value of one hundred pounds, one half of which to be a freehold’”). Massachusetts required of each lower house representative in 1780 a “[f]reehold of £100 in [the] town he represents, or [a] ratable estate of £200 in that town.” THORPE, *supra* note 47, at 69. New Jersey required in 1776 a “£500 real and personal estate in that county.” *Id.* Delaware and Virginia demanded simple “freeholds” in 1776. *Id.* at 70. Maryland in 1776 required “£500 real and personal property.” *Id.* North Carolina in 1776 required “100 acres for life in fee (possessor thereof for 6 mos. before election) in the county represented.” *Id.* South Carolina in 1778 required “£3500 (currency) in real estate.” *Id.* Georgia in 1777 required “250 acres of land or £250.” *Id.* at 71. Tennessee in 1796 required “200 acres, freehold.” *Id.* Only Vermont, New York and Kentucky failed to impose property restrictions on representatives. *Id.* at 69-71. But see BEARD, *supra* note 46, at 67 (noting that New York in 1777 required that its state senators be freeholders of an estate worth one hundred pounds and its electors hold freehold estates). Pennsylvania only required that its representatives be taxpayers. THORPE, *supra* note 47, at 69. Because Connecticut and Rhode Island continued to operate under their old royal charters following the Revolution and did not adopt new constitutions, their electors were required, per their old charters, to hold real or personal property of a certain value. BEARD, *supra* note 46, at 66.

54. BEARD, *supra* note 46, at 68-71 (documenting religious requirements for members of state houses from 1776 through 1799).

55. See *supra* notes 46-49 and accompanying text.

56. THORPE, *supra* note 47, at 69. See also BEARD, *supra* note 46, at 65 (observing that while representatives in New Hampshire were required to own property, “[t]he suffrage was widely extended, for freeholders, tax payers, and even those who paid a poll tax could vote”). By way of contrast, New York’s representatives in 1777 were not subjected to a property restriction, see THORPE, *supra* note 47, at 69, though its electors commonly were. See BEARD, *supra* note 46, at 67 (observing that New York’s senators, their electors, and

more property than members of their local houses of representatives.⁵⁷

Ratified in 1781, the Articles of Confederation left to state legislatures the power to select delegates to Congress.⁵⁸ Similarly, delegates to the Constitutional Convention of 1787 were selected by state legislatures.⁵⁹ Consequently, the qualifications and interests of federal delegates and state representatives during this early American period tended to coalesce.⁶⁰ One might say that the elected federal officials of this era were subject to de facto property requirements.⁶¹ However, following ratification of the Constitution, only one of the original thirteen colonies, Virginia, demanded that its federal representatives own property.⁶²

Between the Constitutional Convention and the American Civil War, most states replaced their property qualifications for voters and representatives with taxpayer requirements and pauper exclusions.⁶³ These

“voter[s] for members of the lower house” were required to be freeholders).

57. See THORPE, *supra* note 47, at 77-79 (documenting property qualifications for state senators found in state constitutions between 1776 and 1800). New Hampshire in 1784, for example, required that its state senators possess a “[f]reehold worth £200.” *Id.* at 77; see also BEARD, *supra* note 46, at 65 (observing that New Hampshire’s constitution of 1784 “provided that ‘no person shall be capable of being elected a senator who is not of the Protestant religion, and seized of a freehold estate in his own right of the value of two hundred pounds’”). Massachusetts in 1780 required “£300 in freehold, or £600 in personal estate.” THORPE, *supra* note 47, at 78. New York in 1777 required that its state senators be “[f]reeholder[s].” *Id.* New Jersey in 1776 required that its senators possess “£1000 proclamaion money, if real and personal estate.” *Id.* Delaware and Virginia required that their senators be “[f]reeholder[s].” *Id.* Maryland in 1776 required “£1000 real and personal [property].” *Id.* North Carolina in 1776 required that its senators possess “300 acres in fee.” *Id.* South Carolina required that its senators in 1778 possess £2000 settled freehold estate.” *Id.* Neither Pennsylvania nor Georgia had upper houses. *Id.* at 78-79; BEARD, *supra* note 46, at 64. Only Vermont and Kentucky eschewed property restrictions between 1776 and 1799. THORPE, *supra* note 47, at 77-79. Some states, like New York, also required that state senators’ electors possess more property than house members’ electors. See BEARD, *supra* note 46, at 67 (noting that in New York senate electors had to possess freeholds worth £100 while house electors only had to possess freeholds worth £20 “or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to this state”).

58. ARTICLES OF CONFEDERATION art. V (1781); see also *U.S. Term Limits v. Thornton*, 514 U.S. 779, 851 n.3 (1995) (Thomas, J., dissenting) (stating that the states could require their delegates to submit qualifications “above and beyond the qualifications created by the Articles of Confederation”).

59. BEARD, *supra* note 46, at 64 (“The resolution of the Congress under the Articles of Confederation calling for the Convention provided that the delegates should be ‘appointed by the states’. The actual selection was made in each case by the legislature, both houses participating, except in Georgia and Pennsylvania, which had unicameral assemblies.”).

60. See *id.* at 65 (“A further safeguard against the injection of too much popular feeling into the choice of delegates to the Convention was afforded by the property qualifications generally placed on voters and members of the legislatures by the state constitutions and laws in force in 1787.”).

61. Electors of delegates to the various state ratifying conventions were also generally restricted by property qualifications. *Id.* at 240. As a result, the elected delegates, while not technically required to own property, were subject to a de facto property qualification. *Id.*

62. *Thornton*, 514 U.S. at 823-24 (citing 1788 Va. Acts, ch. 23, § 2) (footnote omitted).

63. See STEINFELD, *supra* note 46, at 353 (reporting that “[o]utside of the new Western states, very few departed from these norms by establishing white manhood suffrage without pauper exclusion”).

exclusive devices continued through and beyond the Civil War.⁶⁴ In the aftermath of the Civil War, of course, race-based denials of the franchise and right to run for office were outlawed by the federal Civil War Amendments.⁶⁵ Barred from disenfranchising their newly freed slaves, most southern states turned to “poll taxes.”⁶⁶ Although these fees, and their close property-qualification cousins, were whittled away in the early part of the twentieth century,⁶⁷ poll taxes and pauper exclusions were not finally laid to rest until 1969.⁶⁸ Property requirements for elected officials, though of dubious constitutionality, persist to this day.⁶⁹

64. See *id.* at 335 (stating that “[b]y the end of the nineteenth century, fourteen states had excluded either ‘paupers’ generally or inmates of poorhouses from the suffrage [and that] [a]s late as 1934, all of these states continued to do so”).

65. See U.S. CONST. amend. XV, § 1 (prohibiting states from denying or abridging the right to vote “on account of race, color, or previous condition of servitude”); *id.* amend. XIV, § 1 (guaranteeing equal protection). But see *Richardson v. Ramirez*, 418 U.S. 24, 53-56 (1974) (upholding disenfranchisement of convicted felons based on the framers’ intent in drafting section 2 of the Fourteenth Amendment).

66. See CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 1875 (Johnny H. Killian et al. eds., 1987) [hereinafter *CRS ANALYSIS*] (stating that at the end of Reconstruction eleven states in the south instituted the poll tax as a qualification for voting and only five states continued to use a poll tax when the Twenty-fourth Amendment passed).

67. See, e.g., *Breedlove v. Suttles*, 302 U.S. 277, 281 (1937) (sustaining Georgia’s one dollar poll tax while noting that “the Constitutions of some states prohibit or limit poll taxes”); *Johnson v. Grand Forks County*, 113 N.W. 1071, 1072 (N.D. 1907) (observing that the state constitution prohibited property qualifications and poll taxes for voters: “The Legislature cannot prescribe a property qualification as a prerequisite to being allowed to vote [and] . . . cannot require a voter to pay a sum of money to any officer or to any department of government before he can vote”).

68. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 632 (1969) (striking down school board suffrage requirement that voters either have children enrolled in schools or own or lease taxable real property); *Cipriano v. Houma*, 395 U.S. 701, 706 (1969) (nullifying the Louisiana requirement that voters in election to approve revenue bond be property taxpayers); see also *Phoenix v. Kolodzieiski*, 399 U.S. 204, 212-13 (1970) (invalidating the property taxpayer requirement for general bond election). The Twenty-fourth Amendment, passed in 1964, outlawed poll taxes in federal elections. U.S. CONST. amend. XXIV. The Supreme Court in *Harper v. Virginia State Board of Elections*, struck down poll taxes in state elections as violating the Equal Protection Clause. 383 U.S. 663, 667-69 (1966). But even after *Kramer* and *Harper*, property qualifications could still be valid in the context of special-use elections, like “water storage district” elections. See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 727-31 (1973) (upholding California law allowing only landowners to vote in “water storage district” elections); *Ball v. James*, 451 U.S. 355, 371 (1981) (sustaining “one-acre-one-vote” scheme for electing directors of Arizona water district).

69. The Supreme Court in *Turner v. Fouché*, applied a rational basis test to invalidate a Georgia freeholder requirement for school board members under the Equal Protection Clause but cautioned that it was not “excluding the possibility that other circumstances might present themselves in which a qualification for office-holding could survive constitutional scrutiny” 396 U.S. 346, 364 (1970). In *Chappelle v. Greater Baton Rouge Airport District*, the Court struck down, under the authority of *Turner*, a Louisiana property requirement for airport commissioners. 431 U.S. 159 (1977) (per curiam). Most recently, in *Quinn v. Millsap*, the Court invalidated a Missouri law that required certain appointed officials to own real estate, declaring: “we cannot agree . . . that under the Equal Protection Clause . . . land-owners alone may be eligible for appointment to a body empowered to propose a wholesale revision of local government.” 491 U.S. 95, 109 (1989).

3. *Nominating procedures*

The prevalence of voice voting and informal paper ballots at the time of the Constitutional Convention did not mean that nominating procedures were nonexistent. Quite often, informal procedures were followed to propose candidates for office. Groups would “caucus” to nominate friends⁷⁰ or place advertisements in local newspapers to announce candidacies.⁷¹ Regardless of the exact method, “a more or less thorough system of nominating candidates for offices of a general character prevailed” in some of the colonies before independence.⁷²

Both before and after the Revolution, several colonies employed a “process of exclusion” to narrow electoral choices.⁷³ Candidates were “nominated” by voters in a preliminary stage of the election, and only those who received the most nominating votes proved eligible in a later, general election.⁷⁴ The Framers’ creation of the Electoral College for presidential elections is a testament to this approach.⁷⁵ As originally envisioned, the states, through their appointed electors, were to nominate no more than five presidential candidates.⁷⁶ Assuming that none of these five received a majority of all votes cast—a safe assumption “in a vast nation with a primitive communications infrastructure”⁷⁷—this list was then to be referred to the House for ultimate presidential selection.⁷⁸

Connecticut employed this two-stage model before the Revolution and

These three cases are discussed more fully, *infra* notes 213-225 and accompanying text.

70. See ROBERT J. DINKIN, VOTING IN REVOLUTIONARY AMERICA: A STUDY OF ELECTIONS IN THE ORIGINAL THIRTEEN STATES, 1776-1789, 57 (1982) (noting that the basic means for nomination was self-announcement accomplished by friends and relatives who would spread the word).

71. See *id.* at 58 (reporting that in towns that published newspapers, those who wished to run for office would often alert the press and possibly take out an ad to declare their candidacy). Commonly, those who sought administrative posts, “such as sherriff and coroner,” used this approach. *Id.* Occasionally, those seeking legislative positions also used it. *Id.*

72. BISHOP, *supra* note 15, at 120. “There was nothing resembling the modern method of nomination by opposing parties, but the plan followed seems to have been practically a preliminary election for the purpose of reducing the whole number of eligible candidates by a process of exclusion.” *Id.* at 120-21.

73. *Id.*

74. Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2528 (2001). In presidential elections, there was a “‘nomination’ stage, in which an electoral college of elders would express a filtered version of the popular will, and a ‘selection’ stage, in which the House of Representatives would ultimately choose the winner from among the top several candidates.” *Id.*

75. See generally *id.* at 2527-31 (noting that opposition to a popular vote “centered not on a distrust of the unpredictable whims of an unbridled electorate, but rather on the practical ability of voters to make informed choices about national candidates in a vast nation with a primitive communications infrastructure”) (footnotes omitted).

76. See U.S. Const. art. II, § 1, cl. 3.

77. See Note, *Rethinking the Electoral College Debate*, 114 HARV. L. REV. at 2528.

78. See U.S. Const. art. II, § 1, cl. 3.

for thirty years following the ratification of the Constitution.⁷⁹ New Jersey's approach during the first congressional election was similar. It divided the contest into two stages: the first allowed any qualified voter to "nominate four candidates by delivering a list of names to the clerk of the court of common pleas in each county who would in turn transmit them to the governor for publication."⁸⁰ The general electorate then chose four at-large representatives from those so nominated, fifty-four in all, during the second stage.⁸¹

Given their inability to manage ballots and their apparent unwillingness to restrict popular choices, the newly-created states frequently tallied votes for numerous candidates.⁸² Even states that used "processes of exclusion" (like Connecticut and New Jersey) saw lots of candidates receive votes in their final elections.⁸³ New Jersey listed votes for fifty-four candidates, at-large, for four federal House seats in 1789.⁸⁴ Connecticut's first congressional election saw twelve candidates receive votes, at-large, for five House seats.⁸⁵ Because true parties would not emerge for another forty years,⁸⁶ candidacies at the time of the founding were not limited by the forces of politics. While not a free-for-all, the electoral apparatus known to the Framers was freer than the process that exists today.

B. *Post-Bellum Changes in the Electoral Process*

By the time of the Civil War, America had planted the seeds of the

79. See DUBIN, *supra* note 36, at xiv (stating that "Connecticut originally [1788-1818] had a two-part election process unique among the states: [t]he first segment which took place in April, was known as nominations," where the voter chose "a given number of candidates from among all those running." "For example, in the state's first Congressional election, the voter nominated 12 individuals in April who then ran for the state's five Congressional seats in September. In September, voters chose five individuals from among those whom the voters nominated back in April.").

80. Richard P. McCormick, *New Jersey's First Congressional Election, 1789: A Case Study in Political Skulduggery*, 6 WM. & MARY Q. 237, 238 (Apr. 1949).

81. *Id.* at 239-40 (noting that campaigns over the four congressional seats began "even before the legislature adjourned").

82. See DUBIN, *supra* note 36, at 1-2 (illustrating that five candidates in Delaware, vying for one seat, received votes). In Georgia, which used at-large voting for representatives from three districts, eleven candidates were reported to have garnered votes. *Id.* Maryland, which used a combination at-large/district voting system, elected six representatives from twelve candidates. *Id.* New Hampshire counted votes for over ten candidates, at-large, for three House seats. *Id.* In Massachusetts, which relied on districts to elect its eight representatives, over forty candidates received votes. *Id.*

83. *Id.*

84. McCormick, *supra* note 80, at 240. Political rulers in West Jersey and some from East Jersey combined to assemble what was known as the "Junto ticket" which was made up of two candidates from West Jersey and two candidates from East Jersey. *Id.* at 239. In East Jersey, the well known leaders were unable to agree on a slate of candidates whom they could back to oppose the "Junto ticket." *Id.* at 240 (footnotes omitted). Although fifty-four men were nominated, many later withdrew from the race. *Id.*

85. DUBIN, *supra* note 36, at 1-2.

86. See ALDRICH, *supra* note 25, at 97 (tracing the birth of party politics to 1828).

current two-party system. The Republican Party had emerged from the collapse of the Whigs to challenge the existing Democratic Party.⁸⁷ After the war, these two parties continued to control most of America's politics and elections.⁸⁸ It was this control that led the Progressive Movement to demand popular primaries in the early years of the twentieth century. Although local parties in some states voluntarily embraced primaries,⁸⁹ the two major parties generally preferred caucuses and conventions. Primaries, after all, threatened to wrest control of nominations from party bosses and "machines"⁹⁰ and place them in the hands of the masses.

The first direct primary law was passed by the Wisconsin legislature in 1903.⁹¹ By the time the Seventeenth Amendment (which required direct

87. See generally *id.* at 144-56.

88. See *id.* at 159 (stating that the by the 1860s the Democratic and Republican parties' "basic coalitional division of North versus South" was visible and despite the fact that the division varied over time, it was not until the "contemporary era" that it ended).

89. See, e.g., *State v. Hirsch*, 24 N.E. 1062 (Ind. 1890) (describing a political party's primary election in the context of criminal prohibition on selling alcohol on election day).

90. See FREDERICK A. CLEVELAND, *THE GROWTH OF DEMOCRACY IN THE UNITED STATES* 408 (1898) (arguing for limited use of primaries to offset power of party "machines"). Primaries were put in place to correct the deficiencies of the caucus/convention system. *Johnson v. Grand Forks County*, 113 N.W. 1071, 1072 (N.D. 1907). "The methods pursued in such caucuses and conventions, it was believed, had become unrepresentative and unfair, if not corrupt, and the people demanded the enactment of a law under which direct nominations could be made, hoping thereby to eliminate many of the abuses which were thought to have become a part of the old system." *Id.*

91. FREDMAN, *supra* note 23, at 93. Oregon implemented primaries in 1904. See *Patton v. Withycombe*, 159 P. 78, 79 (Or. 1916) (citing Direct Primary Nominating Elections Law, ch. 1, 1905 Or. Laws 7). Nebraska adopted primaries in 1905. See *State ex rel. Adair v. Drexel*, 105 N.W. 174, 175 (Neb. 1905) (referencing Act of Mar. 30, 1905, ch. 66, 1905 Neb. Laws 325). Missouri first mandated primaries in 1913. See *State ex rel. Haller v. Arnold*, 210 S.W. 374, 375 (Mo. 1919) (citing Act of Feb. 24, 1913, § 6014, 1913 Mo. Laws 335, 337). California first used primaries in 1901. See *Socialist Party v. Uhl*, 103 P. 181, 183 (Cal. 1909) (observing that California's constitution was amended in 1890 to empower the legislature to require primaries). Maryland began using primaries in 1904. See *Kenneweg v. Allegany County Comm'rs*, 62 A. 249, 250 (Md. 1905) (citing Act of Apr. 8, 1904, ch. 508, 1904 Md. Laws 870). Illinois added primaries in 1905. See *People ex rel. Breckton v. Bd. of Election Comm'rs of Chi.*, 77 N.E. 321, 322 (Ill. 1906), *overruled by People ex rel. Lindstrand v. Emmerson*, 16 N.E.2d 370 (Ill. 1929) (citing Act of May 18, 1905, § 1, 1905 Ill. Laws 211, 213). Indiana's primary system was put in place in 1915. See *Kelso v. Cook*, 110 N.E. 987, 989 (Ind. 1916) (citing Act of Mar. 8, 1915, ch. 105, 1915 Ind. Acts 359). Tennessee added primaries with its "Primary Election Law" in 1909. See *Ledgerwood v. Pitts*, 125 S.W. 1036 (Tenn. 1910) (citing Act of Feb. 19, 1909, ch. 102, 1909 Tenn. Pub. Acts 281). North Dakota enacted its first primary law in 1905. See *Johnson v. Grand Forks County*, 113 N.W. 1071, 1072 (N.D. 1907) (citing Act of Feb. 21, 1905, ch. 109, 1905 N.D. Laws 207). Washington began using primaries in 1907. See *Boomer v. Nichols*, 97 P. 733, 734 (Wash. 1908) (citing Act of Mar. 15, 1907, ch. 209, 1907 Wash. Laws 457). Nevada adopted direct primaries in 1909. See *Riter v. Douglass*, 109 P. 444, 445 (Nev. 1910) (citing Act of Mar. 23, 1909, ch. 198, 1909 Nev. Stat. 273). Minnesota enacted its first primary law in 1899. See *Fitz v. Jensen*, 89 N.W. 1126, 1127 (Minn. 1902) (citing Act of Apr. 20, 1899, ch. 349, 1899 Minn. Laws 447). All of these laws survived constitutional attack. In the context of presidential elections, only six states, California, Nebraska, North Dakota, Oregon, Wisconsin, and New Jersey, mandated primaries before the election of 1912. See JAMES CHASE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 110 (2004) (describing the mechanics of the presidential election of 1912). For the 1912 presidential election, six more

election of U.S. Senators) was ratified in 1913, the courtship of political primaries and Australian ballots was almost complete.⁹² By 1917, all states used Australian ballots⁹³ and only four had failed to require primaries.⁹⁴

States imported to their primaries the two devices they had used to limit the Australian election ballot in the first instance: filing fees and signature collections. When Oregon adopted primaries in 1904, for example, it required that candidates collect signatures to garner space on its official, pre-printed primary ballots.⁹⁵ By 1915, Oregon added filing fees as alternative access mechanisms.⁹⁶ Missouri, which first mandated primaries in 1913,⁹⁷ authorized candidates to either collect signatures or pay filing fees in order to have their names placed on official ballots.⁹⁸

Some states, like Texas, required that the major parties administer and fund their own primaries.⁹⁹ Naturally, the parties passed these costs on to candidates by way of filing fees.¹⁰⁰ Where this happened, fees tended to be quite large; parties, moreover, rarely allowed non-monetary alternatives or exceptions.¹⁰¹

Filing fees became common even in those states that provided public funding for party primaries. Nevada, for example, initially required that candidates both pay a fee and collect signatures from three percent of the

states, Illinois, Massachusetts, Pennsylvania, Maryland, Ohio and South Dakota, had added presidential primaries. *Id.*

92. State courts routinely rejected the argument that primaries differed from general elections and thus should be subjected to different rules. *See, e.g., Johnson*, 113 N.W. at 1073 (holding that the same restrictions on voting rights and ballot access apply to primaries as well general elections).

93. *See supra* notes 29-36 and accompanying text (describing the development of the Australian ballot in the United States).

94. FREDMAN, *supra* note 23, at 93.

95. *See Patton*, 159 P. at 79 (citing Direct Primary Nominating Elections Law, ch. 1, 1905 Or. Laws 7).

96. *Id.*

97. *See generally* Haller v. Arnold, 210 S.W. 374 (Mo. 1919).

98. *Id.* at 375.

99. *See Bullock v. Carter*, 405 U.S. 134, 137-38 (1972) (describing Texas's primary system and the manner in which Texas funded the system).

100. In Texas, the Terrell Election Law mandated primaries for all state, district, and county offices. O. Douglas Weeks, *The Handbook of Texas Online*, at <http://www.tsha.utexas.edu/handbook/online/articles/view/EE/wde1.html> (last modified May 13, 2005) (on file with the American University Law Review). Prior to the advent of primaries, party conventions selected candidates. *Id.* Because primaries were required to be administered and funded by the parties, "most of the money came from filing fees." *Id.*; *see also* Ledgerwood v. Pitts, 125 S.W. 1036, 1045 (Tenn. 1910) (describing the Tennessee primary law that required parties to hold and fund primaries while capping the fees charged).

101. *Bullock*, 405 U.S. at 138-39. The Court in *Bullock* stated that, [t]he record shows that the fees required of the candidates in this case are far from exceptional in their magnitude. The size of the filing fees is plainly a natural consequence of a statutory system that places the burden of financing primary elections on candidates rather than on the governmental unit, and that imposes a particularly heavy burden on candidates for local office. *Id.* (footnote omitted).

eligible, registered voters.¹⁰² By 1914, however, the state had abandoned signature collection and relied solely on fees.¹⁰³ Minnesota,¹⁰⁴ North Dakota,¹⁰⁵ Tennessee,¹⁰⁶ South Dakota,¹⁰⁷ Indiana,¹⁰⁸ and Nebraska¹⁰⁹ (among others¹¹⁰) all opted for filing fees by 1916.¹¹¹

The fees charged by most states, though not nominal, were constitutionally reasonable when judged by today's ballot fee standards.¹¹² States today commonly charge candidates up to one percent of an office's annual salary¹¹³ (which for congressional candidates translates into just

102. See *Riter v. Douglass*, 109 P. 444, 456 (Nev. 1910) (sustaining the use of filing fees).

The right of the Legislature to exact a reasonable fee from candidates for office has been sustained in practically every state where a primary law exists upon the same principle that fees in actions at law and proceeding in courts and for the filing and recording of documents are sustained.

Id. The Court further noted that because elected politicians benefited from becoming elected, they should feel "compelled to reimburse the state for at least some of the portion of the expense which the state incurs in maintaining the means whereby they accomplish their desires." *Id.*

103. See *State ex rel. Riggle v. Brodigan*, 143 P. 238, 239 (Nev. 1914) (highlighting the controversy behind signature requirements that led the legislature to change the primary election law to only require ballot fees because candidates felt the signature collection process was harsh).

104. See *State ex rel. Thompson v. Scott*, 108 N.W. 828, 830 (Minn. 1906) (sustaining filing fees as reasonable and constitutional).

105. See *Johnson v. Grand Forks County*, 113 N.W. 1071, 1076 (N.D. 1907) (striking down filing fee as arbitrary and not useful for the stated purposes).

106. See *Ledgerwood v. Pitts*, 125 S.W. 1036, 1045 (Tenn. 1910) (holding filing fee requirements unconstitutional).

107. See *Ballinger v. McLaughlin*, 116 N.W. 70, 71 (S.D. 1908) (invalidating a filing fee requirement as an unconstitutional exaction).

108. See *Kelso v. Cook*, 110 N.E. 987, 996 (Ind. 1916) (finding filing fee requirements arbitrary and unfair to minority party candidates).

109. See *State ex rel. Adair v. Drexel*, 105 N.W. 174, 180 (Neb. 1905) (declaring a filing fee requirement an "unwarranted hindrance and impediment to the free exercise of the elective franchise").

110. See generally J.A. Connelly, *Validity and Effect of Statutes Exacting Filing Fees From Candidates for Public Office*, 89 A.L.R.2d 864 (1963) (cataloging states that enacted filing fee requirements for primaries).

111. Some states, like New Hampshire, see Public Laws of the State of New Hampshire, ch. 25, § 13 (Clarke Press 1925) (charging \$100 fee for Senatorial candidates and \$50 fee for House candidates), allowed signature collection as alternatives. *Id.* § 14. New Hampshire allowed the parties, by convention, to nominate their candidates when no one entered their primaries. See Act Relating to Primary Elections, Nominations of Candidates and Political Expenditures, ch. 137, § 2, 1927 N.H. Laws. Even in this situation, however, the parties were required to pay the filing fee. *Id.* ("The party committee shall pay the usual filing fee or file the usual number of petitions with the nominations.").

112. See Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 OHIO ST. L.J. 1281 (1997) (describing filing fees in place at the time of the 1996 elections and concluding that by comparative standards fees equal to one percent of the congressional salary are constitutionally reasonable).

113. *Id.* at 1310-12 (reporting that of the twenty-seven states charging filing fees for congressional elections in 1996, all but five charged one percent of the congressional salary or less). Because Delaware was incorrectly cataloged in that study as charging only one percent of the annual congressional salary, as opposed to the salary for the full two-year term, see *Biener v. Calio*, 361 F.3d 206, 209 (3d Cir. 2004), *cert. denied*, *Biener v. Calio*, 125 S. Ct. 55 (2004) (upholding Delaware law authorizing parties to charge fee equal to one

over \$1,600).¹¹⁴ Assuming that one percent of an office's salary is constitutionally agreeable, most primary fees in the early 1900s seemed reasonable. Indiana¹¹⁵ and Washington,¹¹⁶ for example, both required that candidates pay one percent of their expected annual salaries in order to run in newly mandated primaries. South Dakota in 1908 charged five dollars for the privilege of running for the state legislature.¹¹⁷ Minnesota charged twenty dollars in 1906 to run for any salaried office.¹¹⁸ Nevada's fee in 1914 for statewide office was \$100.¹¹⁹ Tennessee in 1910 authorized political parties to charge up to fifty dollars for those seeking election to the federal House of Representatives.¹²⁰ California in 1907 charged twenty-five dollars to run for the House of Representatives and fifty dollars to run for the Senate.¹²¹ North Carolina in 1915 charged fifty dollars for both Houses of Congress.¹²² Illinois's \$100 fee for congressional candidates (both the Senate and House) in 1906¹²³ was not much more than one percent of the congressional salary (\$7,500),¹²⁴ nor was the \$100 fee

percent of salary for entire term), six states of the aforementioned twenty-seven states in 1996 charged more than one percent of the annual congressional salary. Still, a majority of states using filing fees charged one percent or less of the congressional salary.

114. See PAUL E. DWYER, CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, SALARIES OF MEMBERS OF CONGRESS: A LIST OF PAYABLE RATES AND EFFECTIVE DATES, 1789-2004, tbl. 1 (2005) (listing congressional salaries as of Jan. 1, 2005 at \$162,100), available at <http://www.senate.gov/reference/resources/pdf/97-1011.pdf>.

115. See *Kelso v. Cook*, 110 N.E. 987, 996 (Ind. 1916) (striking down filing fee requirements as arbitrary and unfair to minority party candidates).

116. See *State ex rel. Boomer v. Nichols*, 97 P. 733, 734 (Wash. 1908) (sustaining a filing fee as a reasonable requirement).

117. See *Ballinger v. McLaughlin*, 116 N.W. 70, 71 (S.D. 1908) (invalidating a filing fee requirement as an unconstitutional exaction).

118. See *State ex rel. Thompson v. Scott*, 108 N.W. 828, 829 (Minn. 1906) (sustaining filing fees as reasonable and constitutional).

119. See *State ex rel. Riggle v. Brodigan*, 143 P. 238, 239-40 (Nev. 1914) (finding that a filing fee was a reasonable legislative regulation).

120. See *Ledgerwood v. Pitts*, 125 S.W. 1036, 1045 (Tenn. 1910) (striking down fee requirements as unconstitutional).

121. See 1907 Cal. Stat. § 7.1. ("A filing fee of fifty dollars shall be paid to the secretary of state when the nomination paper or papers and affidavit for any candidate for state office or the United States senate are filed with such secretary of state."); *id.* § 7.2 (establishing the fee of \$25 for House candidates). California also used public funds to conduct the primaries. See 1907 Cal. Stat. § 9 ("The expense of providing all ballots . . . used at any primary election . . . and all expenses necessarily incurred . . . shall be paid out of the treasury of the city, city and county, county or state, as the case may be, in the same manner, with like effect and by the same officers as in the case of elections.").

122. Act of Mar. 9, 1915, ch. 101, § 4, 1915 N.C. Sess. Laws 154, 155-56.

123. See *People ex rel. Breckton v. Bd. of Election Comm'rs of Chi.*, 77 N.E. 321, 324 (Ill. 1906), *overruled by* *People ex rel. Lindstrand v. Emmerson*, 16 N.E.2d 370 (Ill. 1929) (striking down filing fee requirements as "purely arbitrary exactions of money").

124. See DWYER, *supra* note 114, at tbl. 1 (reporting that the congressional salary in 1907 was \$7,500), available at <http://www.senate.gov/reference/resources/pdf/97-1011.pdf>. By way of comparison, \$75 in 1907 was the equivalent (using the Consumer Price Index) of about \$1,460 in 2003. See SAMUEL H. WILLIAMSON, ECONOMIC HISTORY SERVICES, WHAT IS THE RELATIVE VALUE?, at <http://www.eh.net/hmit/compare/> (last visited June 22, 2005) (on file with the American University Law Review) (calculating the relative value of past dollar amounts using the Consumer Price Index).

charged federal House candidates by Oregon in 1915.¹²⁵

Not all ballot fees at this time were reasonable. As is still true today, some states charged fees that no common person could afford or meet. Louisiana, for example, required that congressional candidates in 1906 post a \$250 “good faith” bond, which would be returned upon a candidate’s winning ten percent of the vote.¹²⁶ This is the equivalent of demanding a \$5,000 performance bond today.¹²⁷ Tennessee required that senatorial candidates in 1910 pay a \$500 ballot fee.¹²⁸ Adjusted for inflation, this translates into about \$10,000 today.¹²⁹ Oregon’s \$150 filing fee for senatorial candidates in 1915¹³⁰ constituted two percent of the annual congressional salary at that time,¹³¹ about \$3,000 by today’s standards.¹³²

125. See Act of Feb. 23, 1915, ch. 124, § 6, 1915 Or. Laws 124, 126 (listing the fees for each elected office); DWYER, *supra* note 114, at tbl. 1 (reporting that between March 4, 1905 and March 4, 1925, the salary for a member of Congress was \$7,500).

126. Act of June 29, 1906, No. 49, § 12, 1906 La. Acts 66, 69. It would appear reasonably clear that Louisiana’s adoption of the Australian ballot in 1898, *see State ex rel. Labauve v. Michel*, 46 So. 430, 431 (La. 1908) (describing the process whereby Louisiana adopted the Australian ballot system), and primary mechanism in 1906, *id.* at 432, were in part racially motivated. See FREDMAN, *supra* note 23, at 73 (observing that in the South in general, adoption of the Australian ballot flowed from “the mingled motives of discrimination and reform”). The thought was that the Australian ballot would effectively disenfranchise illiterates, who were primarily black. *Id.* Primaries, in turn, would allow the two political parties to exclude black voters from effective political participation, free from the Fifteenth Amendment’s constraints. *Id.* Louisiana’s large candidate bond may have been similarly motivated.

127. See WILLIAMSON, *supra* note 124 (using the Consumer Price Index to measure relative value). In today’s terms, this would constitute over one percent of the congressional salary. Only Florida and Delaware today authorize or require more than three percent of the annual congressional salary. See Brown, *supra* note 112, at 1298 (reporting that Florida charges six percent of the congressional salary); DEL. CODE ANN. tit. 15, § 3103(b) (2004) (authorizing parties to set filing fees up to one percent of term’s salary, which for Senators was \$9,000 in 2004).

128. See *Ledgerwood v. Pitts*, 125 S.W. 1036, 1045 (Tenn. 1910) (striking down fee requirements as unconstitutional). The fact that the state legislature still elected Tennessee’s Senators at this time may have influenced this inflated figure, which was ten times the fee charged House candidates.

129. See WILLIAMSON, *supra* note 124 (using the Consumer Price Index to measure relative value). Only Florida has charged more than \$10,000 for the privilege of running for congressional office. See Brown, *supra* note 112, at 1298 (reporting that Florida charged \$10,020 in 1996 and lowered its fee to \$8,016 in 1998). Today, Florida charges a fee equal to six percent of the office’s annual salary. See FLA. STAT. ANN. § 99.092(1) (West 2005) (requiring a filing fee of three percent of the annual salary, an election assessment of one percent of the annual salary, and a party assessment of two percent of the annual salary). This translates into over \$9,000 for candidates seeking to run in either a House or Senate primary.

130. Act of Feb. 23, 1915, ch. 124, § 6, 1915 Or. Laws 124, 126.

131. See DWYER, *supra* note 114, at tbl. 1 (reporting that between March 4, 1905 and March 4, 1925, the salary for a member of Congress was \$7,500). North Dakota similarly charged candidates for “county and district offices” in 1907 two percent of their annual salaries. See *Johnson v. Grand Forks County*, 113 N.W. 1071, 1071 (N.D. 1907) (striking down fee as property qualification to the extent that it exceeded a fee for services rendered). Fees for the state senate and house, however, were capped at thirty dollars and ten dollars, respectively. *Id.*

132. See WILLIAMSON, *supra* note 124 (using the Consumer Price Index to measure relative value).

Unlike Australian ballot laws and modern primary requirements, which have uniformly survived constitutional attack, the filing fees of the early twentieth century were frequently challenged and sometimes ruled invalid.¹³³ For instance, the North Dakota Supreme Court invalidated forty and forty-eight-dollar fees for county auditor and state treasurer, respectively, as (among other things) amounting to impermissible property qualifications: “The law is as objectionable as if the test was based on a property qualification or the amount the elector had contributed to the public revenues.”¹³⁴ The Illinois Supreme Court employed a similar egalitarian principle to strike down ballot fees, reasoning that “there can be no discrimination between candidates based upon the ground that one has money to pay for the privilege of being a candidate and chooses to pay, and another has not the means, or is unwilling to buy the privilege.”¹³⁵ Several other state supreme courts, like Tennessee’s,¹³⁶ South Dakota’s,¹³⁷ Indiana’s,¹³⁸ and Nebraska’s,¹³⁹ employed the *Lochner*-esque logic of the

133. See, e.g., *People ex rel. Breckton v. Bd. of Election Comm’rs of Chi.*, 77 N.E. 321, 325 (Ill. 1906) (nullifying an Illinois law charging fees to candidates running in primary elections), *overruled by* *People ex rel. Lindstrand v. Emmerson*, 165 N.E. 217, 224 (Ill. 1929) (sustaining primary elections while striking down filing fees); *Ledgerwood*, 125 S.W. at 1036 (sustaining Tennessee’s primary election system but striking down filing fees).

134. *Johnson*, 113 N.W. at 1076. In drawing this conclusion, the court equated candidates’ rights with those of voters and held that because voters could not be required “to pay a sum of money to any officer or to any department of government before he can vote,” *id.* at 1072, neither could a candidate be charged a fee to run for office. *Id.* at 1073-74. North Dakota today requires that candidates collect signatures to garner a place on the ballot rather than pay filing fees. N.D. CENT. CODE § 16.1-11-06 (2004).

135. *Breckton*, 77 N.E. at 324. Illinois today requires that candidates collect signatures for ballot access rather than pay filing fees. 10 ILL. COMP. STAT. ANN. 5/7-10(b) (West 1993 & Supp. 2003).

136. See *Ledgerwood*, 125 S.W. at 1046 (striking Tennessee’s ballot fee because it “makes an arbitrary, capricious, and unreasonable classification of candidates in providing that persons who are able to pay the prescribed fees may enter the primary, while other men who are equally capable and worthy are excluded because of their pecuniary inability to pay the prescribed fee”). Tennessee today requires that candidates qualify by collecting signatures rather than pay filing fees. TENN. CODE ANN. § 2-5-101(b)(1) (1994 & Supp. 2004).

137. See *Ballinger v. McLaughlin*, 116 N.W. 70, 71 (S.D. 1908) (finding South Dakota’s filing fee to be “an arbitrary tax” and “clearly unconstitutional”). South Dakota first imposed a filing fee for primaries in 1907. See *id.* (citing Primary Election Law of 1907, ch. 139, § 10, 1907 S.D. Laws 291). Fees ranged from one dollar (for nomination as a delegate to a state convention) to fifteen dollars (for nomination for county treasurer and sheriff). *Id.* The court concluded that anything “in excess of a uniform nominal filing fee” is invalid. *Id.* The court explained that the fees had no relationship to the services the elected officials performed and therefore a candidate running for Governor should not have to pay a larger fee than a candidate running for county commissioner. *Id.* South Dakota today requires that candidates collect signatures rather than pay fees. S.D. CODIFIED LAWS § 12-6-7 (West 2004).

138. See *Kelso v. Cook*, 110 N.E. 987, 997 (Ind. 1916) (invalidating filing fees that are arbitrarily based on candidate’s salaries). Today, Indiana charges no fees for any of its offices, but requires signature collections for some. IND. CODE ANN. § 3-8-2-8 (Michie 2004).

139. See *State ex rel. Adair v. Drexel*, 105 N.W. 174, 179 (Neb. 1905) (striking fee that charged more than expense of placing name on ballot as being “arbitrary”). Nebraska today

day to strike down fees as being “arbitrary” and beyond the power of government.

These decisions notwithstanding, most ballot fees survived constitutional scrutiny over the course of the next three generations.¹⁴⁰ Not until the Supreme Court’s 1972 decision in *Bullock v. Carter*¹⁴¹ was the Federal Constitution employed to limit ballot fees. Because of the Warren Court’s decisions less than ten years prior striking down poll taxes and property requirements for voters,¹⁴² the Burger Court’s decision in *Bullock* was not surprising. If the Equal Protection Clause protected one side of the electoral process, then it ought also to protect the other. Thus, it was only natural for the Court to seriously question Texas’s outlandish ballot fees in *Bullock*. Texas’s fees varied with offices, but all shared a common characteristic; they were substantial.¹⁴³

Applying heightened scrutiny, the Court in *Bullock* unanimously concluded that these fees violated the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁴ Texas’s two justifications—insuring that only serious candidates run and defraying the costs of primaries—were deemed insufficient to justify the fees.¹⁴⁵ In terms of funding, the Court found that

uses filing fees. NEB. REV. STAT. § 32-608(2) (2004).

140. See Comment, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. PA. L. REV. 109, 109 (1971) (observing that “qualifying fees, the nonpayment of which bars a candidate from placement on a state primary or general election ballot . . . were often upheld”); Connelly, *supra* note 110 *passim* (collecting cases that upheld filing fee requirements).

141. 405 U.S. 134 (1972).

142. See *infra* notes 208-212 and accompanying text (detailing the evolution from the validation of poll taxes to invalidating poll taxes and property requirements under Equal Protection analysis).

143. The fee for County Commissioner, for example, was \$1,424.60 and for County Judge, the fee was \$6,300. *Bullock*, 405 U.S. at 135-36. Texas’s scheme required candidates to “pay their filing fee to the county executive committee of the political party conducting the primary” and “the committee also determine[d] the amount of the fee.” *Id.* at 137-38. Neither of these facts insulated the fee schedules, because the court found that the fee requirements amounted to state action (under the Fourteenth Amendment). *Id.* at 140. Despite the fact that the fees were limited to party primaries, the court determined that such fees were part of the mechanism that led to the eventual selection of state legislatures. *Id.* at 140. Consequently, whether the state or a major party sets and collects the state’s ballot fees, the same constitutional analysis applies. See, e.g., *Green v. Mortham*, 155 F.3d 1332, 1338 (11th Cir. 1998), *reh’g denied*, *Green v. Mortham*, 165 F.3d 42 (11th Cir. 1998), and *cert. denied*, *Green v. Mortham*, 525 U.S. 1148 (analyzing a Florida *state* statute setting filing fees under a reasonableness standard); *Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004), *cert. denied*, *Biener v. Calio*, 125 S. Ct. 55 (2004) (analyzing and upholding ballot access restrictions set by the Delaware Democratic Party under rational basis review).

144. *Bullock*, 405 U.S. at 144 (finding that the filing fee system had a “real and appreciable impact on the exercise of the franchise”).

145. *Id.* at 147-48. The Court explained that it reject[ed] the theory that since the candidates are availing themselves of the primary machinery, it is appropriate that they pay that share of the cost that they have occasioned. . . . [T]he costs do not arise because candidates decide to enter a primary or because the parties decide to conduct one, but because the State has, as a matter of legislative choice, directed that party primaries be held.

the only constitutionally acceptable choice was to socialize the costs of primaries.¹⁴⁶ States might charge fees, but they could not demand them simply to offset the cost of elections. In terms of deterrence, the Court hinted that non-monetary restrictions might be more effective.¹⁴⁷ Nevertheless, the *Bullock* Court did not fully resolve the legality of ballot fees. In particular, it left open the possibility that smaller fees might survive.¹⁴⁸

Two years later, in *Lubin v. Panish*¹⁴⁹ the Court addressed a relatively modest California requirement that House primary candidates pay a fee equal to one percent (\$425) of the congressional salary. California asserted that the fee was needed to “keep the ballot from being overwhelmed with frivolous or otherwise nonserious candidates.”¹⁵⁰ The Court rejected California’s claim, concluding that even California’s modest fee was relatively inefficient in terms of screening out frivolous candidates.¹⁵¹ Consequently, by the mid-1970s it became clear that states could not rely *solely* on filing fees to limit their ballots. Instead, reasonable non-monetary alternatives, such as waivers and signature collections, were constitutional necessities.¹⁵² Reasonable fees would survive, but only if paired with non-

Id.

146. *Id.* at 148 (emphasizing that because the goal is to give voters in the primary stage some influence over who gets nominated, the cost should be spread out among the voters in order to ensure that wealth does not have a disproportionate impact).

147. *Id.* at 146.

148. *Id.* at 149 (hinting that in “other contexts” the Court might find reasonable filing fees or licensing fees valid).

149. 415 U.S. 709 (1974).

150. *Id.* at 714.

151. *Id.* at 717 (“A large filing fee may serve the legitimate function of keeping ballots manageable but, standing alone, it is not a certain test of whether the candidacy is serious or spurious We have also noted that prohibitive filing fees, such as those in *Bullock*, can effectively exclude serious candidates.”). Although *Bullock* and *Lubin* speak often to equal protection, heightened scrutiny in both cases appears predicated largely on the First Amendment norm of free political participation. One has a right to associate with others for political ends, which necessarily includes running for office. It is the fundamental nature of this right, together with correlative rights of voters to choose their representatives, which leads to increased judicial scrutiny. Although the Court has best analyzed the political applications of the First Amendment in the context of minor parties and independent candidates attempting to access *general* election ballots, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 867 (5th ed. 1995) (analyzing ballot restrictions in light of First Amendment and Equal Protection analyses), it appears clear that these same principles apply with at least the same force where primaries are at stake.

152. See, e.g., *Andress v. Reed*, 880 F.2d 239, 241 (9th Cir. 1989) (sustaining California’s 10,000 signature alternative which was adopted in response to *Lubin*, 415 U.S. at 709); *Harper v. Vance*, 342 F. Supp. 136, 144 n.9 (N.D. Ala. 1972) (striking down Alabama’s flat \$850 filing fee for Senatorial election and suggesting an exception that would “permit financially unable candidates to qualify by demonstrating their inability to pay”); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 646 (3d Cir. 2003) (holding that Pennsylvania ballot access law requiring a fee and lacking a non-monetary alternative violated the Equal Protection Clause). See generally Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 377-78 & n.114 (1996) (arguing that states presumably must provide an alternative to filing

monetary access mechanisms.

fees even if the fee amount is reasonable). It has also become clear that states cannot force parties and candidates to finance primaries. *See* *Bullock v. Carter*, 405 U.S. 134, 146-49 (1972) (declaring that the cost of primaries should be spread among the voters, and that costs arise because states decide to hold primaries, not because candidates choose to run). *Republican Party of Arkansas v. Faulkner County*, presents a more recent application of this principle. 49 F.3d 1289 (8th Cir. 1995). There, the Eighth Circuit struck down an Arkansas statute that required political parties to conduct and pay for primary elections, reasoning that parties with limited resources would be disadvantaged and that the resulting disparity in polling places unconstitutionally prevented individuals from voting. *Id.* at 1291. Whether by an outright funding requirement or by an unduly large filing fee, the rule is clear; a state cannot shift the entire monetary cost of political primaries to parties and candidates.

II. THE MODERN STATUTORY FRAMEWORK

Several states¹⁵³ abandoned ballot fees following the Supreme Court's decision in *Lubin*.¹⁵⁴ Because *Bullock* and *Lubin* did not hold ballot fees impermissible, a larger number of states simply added non-monetary alternatives. Rather than abolish or reduce its ballot fees for congressional offices, for example, Texas merely added non-monetary alternatives.¹⁵⁵ As

153. See ARIZ. REV. STAT. § 16-322.A.2 (1956) (requiring that candidates for Congress collect signatures from 0.5% of registered party members in the district); COLO. REV. STAT. § 1-4-801(2)(b) (2004) (necessitating that candidates for the general assembly, district attorney, or any district office higher than county office amass 1000 signatures); 10 ILL. COMP. STAT. ANN. 5/7-10(b) (West 1993) (providing that candidates seeking to run for United States Congress gather signatures from 0.5% of qualified primary voters that are party members in the district); IOWA CODE § 43.20.1.C (1999) (mandating that a candidate for Congress obtain signatures from two percent of voters of the candidate's party in at least half of the counties in the district, and not less than one percent of total vote of the candidate's party in the district); ME. REV. STAT. ANN. TIT. 21-A, § 335.5.C (West 1964) (commanding at least 1000 signatures from voters in district for candidates for Congress); MASS. ANN. LAWS ch. 53, § 6 (Law. Co-op. 1990) (establishing that candidates for Congress must receive 2000 signatures to be placed on the ballot); MICH. COMP. LAWS § 168.544f (2004) (charting the required number of partisan, non partisan, and qualifying petitions by total population of the district); N.J. STAT. ANN. § 19:23-8 (1999) (prescribing that congressional candidates acquire two hundred signatures from party members in district who voted in last election); N.M. STAT. ANN. § 1-8-33.B (Michie 1978) (stating that candidates for Congress must amass signatures from two percent of party voters in last gubernatorial election or from seventy-seven voters, whichever is greater, to receive preprimary convention designation); N.Y. ELEC. LAW § 6-136.2(g) (McKinney 1998) (setting the number of required signatures from party members in district at 1,250 for congressional office); N.D. CENT. CODE § 16.1-11-06 (2004) (dictating that candidates for U.S. Senator, U.S. Representative, or state office, except state senator, representative, or judge of supreme or district court, submit a list of at least 300 signatures of qualified voters to the secretary of state); S.D. CODIFIED LAWS § 12-6-7 (Michie 2004) (requiring that the nominating petition list the signatures of one percent of party voters who participated in last gubernatorial election in the county, part of the county, district, or state); TENN. CODE ANN. § 2-5-101(b)(1) (Supp. 2004) (announcing that candidates must collect twenty five signatures); VT. STAT. ANN. tit. 17, § 2355 (2002) (instructing that candidates for state and congressional offices gather 500 signatures from voters); WIS. STAT. ANN. § 8.15(6)(b) (West 2004) (proclaiming that a candidate for Congress accumulate 1000 signatures from voters in the district). Indiana charges neither a fee nor demands signature collection to access primary ballots for House elections. IND. CODE ANN. § 3-8-2-7 (West 2003) (indicating that person must declare candidacy by providing, among other things, name, address, party affiliation, and statement regarding eligibility to run for office). Although the precise number of signatures varies between states and offices, states that have dispensed with fees commonly require up to 1,000 signatures for congressional (House) races. See generally Brown, *supra* note 112, at 1284 n.11 (cataloging the sixteen states that do not currently require a filing fee and listing the five states that require both a fee and signatures for primary ballot access). The number of signatures needed for Senatorial races is generally larger. California, for example, requires that Senatorial candidates collect 10,000 signatures. CAL. ELEC. CODE § 8106(a)(3) (West 2003). Only 3000 signatures are needed for the federal House. *Id.* § 8106(a)(2).

154. See *Lubin*, 415 U.S. at 712 (stating that the seriousness of a candidate could be measured by non-monetary means). A larger percentage of states rely solely on signature collection for presidential primaries and elections. See Trevor Potter & Marianne H. Viray, *Barriers to Participation*, 36 U. MICH. J.L. REFORM 547, 577-83 tbl. 1 (2003) (indicating that at least twenty-two states rely solely on signature collection to access presidential ballots).

155. Compare *Bullock v. Carter*, 405 U.S. 134, 140 (1972) (assessing a \$1,000 fee for

demonstrated below,¹⁵⁶ the composite following *Bullock* and *Lubin* thus does not differ too much from before: fees remain a staple throughout the United States. Further, ballot fees can be steep (if not unreasonable under the Fourteenth Amendment); it is not uncommon for charges for federal office to reach into the thousands of dollars.

Because the Constitution delegates electoral regulatory authority to the individual states,¹⁵⁷ exact procedures and conditions vary around the nation. In terms of structure, states today generally require that major parties conduct primaries, the winners of which then face off in general elections.¹⁵⁸ Minor party¹⁵⁹ and independent¹⁶⁰ candidates are allowed to participate in general elections if they can demonstrate some specified modicum of support, generally a rough approximation of the primary demands placed on major party candidates.¹⁶¹ The support needed

federal senatorial ballot access in 1972), with TEX. ELEC. CODE ANN. § 172.024(a)(1), (3) (Vernon 2003) (requiring a \$5,000 filing fee for federal Senate candidates and a \$3,125 filing fee for federal House candidates in 2005). Texas today alternatively allows signature collections. See TEX. ELEC. CODE ANN. § 172.025 (Vernon 2003) (stating that candidate must collect 5,000 signatures for statewide office and for district either 500 or “two percent of the total vote received in the district, county, or precinct, as applicable, by all the candidates for governor in the most recent gubernatorial general election”).

156. See *infra* notes 157-195 and accompanying text.

157. See U.S. CONST. amend. X (reserving to states powers not expressly allowed the federal government); U.S. CONST. art. I, § 4 (granting state legislatures the authority to define the “Times, Places and Manner of holding Elections for Senators and Representatives”); U.S. CONST. art. II, § 1, cl. 2 (providing that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”). Although Congress has the power to overrule state regulations of federal congressional elections under Article I, see U.S. CONST. art. I, § 4, cl. 1 (stating that “Congress may at any time by Law make or alter such Regulations”), it has for the most part refused to intervene.

158. See *Morse v. Republican Party of Va.*, 517 U.S. 186, 207 (1996) (observing that “most states [have] effectively divided [their] election laws into two stages, the first consisting of the selection of party candidates and the second being the general election itself”). Only four states appear to fall outside this model. Virginia allows parties to select nominees by primary, convention, or other method. VA. CODE ANN. § 24.2-509(A) (West 1993). Utah, New Mexico, and Connecticut, hold primaries only when more than one candidate at the pre-primary convention receives a significant modicum of support. See CONN. GEN. STAT. ANN. §§ 9-381 - 9-450 (West 1958) (describing caucus, procedure for ties, and timing with respect to primary); N.M. STAT. ANN. § 1-8-33 (1978) (stating pre-primary convention requirements); UTAH CODE ANN. § 20A-9-403 (2004) (stating that parties must choose to use primary system). In New Mexico, a candidate who did not receive enough support at the convention to qualify for the primary can still gain access by collecting signatures from four percent of the party’s electors in the last gubernatorial election in the state or congressional district. N.M. STAT. ANN. § 1-8-33(D) (1978).

159. See, e.g., FLA. STAT. ANN. § 99.096(2), (3)(b) (West 2002) (requiring that minor party candidate slated by party pay filing fee to run in general election or alternatively collect signatures equal to one percent of registered voters in district).

160. See, e.g., FLA. STAT. ANN. § 99.0955(2), (3)(b) (West 2002) (stating that an independent candidate may have his or her name placed on general ballot by paying a filing fee equal to four percent of the annual salary of the office sought or if supported by signatures from one percent of registered voters in district).

161. Laws that force minor party and independent candidates to pay more or collect significantly more signatures than major party candidates encounter constitutional problems. See *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) (explaining that a “burden that falls unequally on new or small political parties or on independent candidates impinges, by its

ordinarily takes the form of paying the same filing fee or collecting an equivalent number of signatures. Write-in candidates are sometimes allowed,¹⁶² though they have no constitutional right to participate in either primaries or general elections.¹⁶³

Of those states that have retained filing fees for state offices and congressional elections, all but a handful have implemented some form of alternative access.¹⁶⁴ Five provide outright waivers to those candidates who are “indigent” or “unable” to pay the stated fee.¹⁶⁵ More commonly,

very nature, on associational choices protected by the First Amendment”); *Fulani v. Krivanek*, 973 F.2d 1539, 1547 (11th Cir. 1992) (stating that a Florida law could not exclude minor parties, defined as those parties that have less than five percent of registered voters, from a provision that allowed all other candidates to waive a signature verification fee if the fee posed an undue burden on financial resources). *But see LaRouche v. Kezer*, 990 F.2d 36, 41 (2d Cir. 1993) (sustaining media recognition statute that authorized the exclusion from presidential ballot of minor candidates who were not generally recognized by press, because candidates who were not recognized by the media but collected the signatures of one percent of their party’s registered voters could still be placed on the ballot under a petition alternative statute).

162. *See, e.g.*, FLA. STAT. ANN. § 99.061(3)(a) (West 2002) (permitting write-in candidates to submit qualification papers any time after noon of the first day but before noon on the last day of the qualifying period). Some states require that write-in candidates register in advance in order to have their votes counted. *See, e.g.*, MICH. COMP. LAWS ANN. § 168.737a (West 2004) (requiring registration by 4 p.m. on the Friday preceding election); MINN. STAT. § 204B.09(3)(a) (1992) (declaring that write-in declarations must be filed at least five days before election); OHIO REV. CODE ANN. § 3513.041 (Anderson 1996) (mandating that write-in candidates register fifty days in advance of election); WASH. REV. CODE § 29A.24.311 (Supp. 2005) (demanding registration at least by the day preceding election). Maine and the District of Columbia allow write-in candidates to declare their candidacies even after the elections are over. *See* D.C. CODE ANN. § 1-1001.08(3) (2001) (explaining that write-in candidate can declare candidacy no later than 4:45 p.m. on the seventh day after the election); ME. REV. STAT. ANN., tit. 21-A, § 722-A (West Supp. 2004) (allowing candidate to submit declaration of intent three business days after the election).

163. *See Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (asserting that Hawaii’s prohibition of write-in voting imposes no unconstitutional burdens under First and Fourteenth Amendments).

164. Those states that continue to charge ballot fees without expressly providing alternative access include Kentucky, *see* KY. REV. STAT. ANN. § 118.255(1) (Banks-Baldwin 1994) (prescribing a \$500 filing fee for congressional candidates); Mississippi, *see* MISS. CODE ANN. § 23-15-297 (2001) (assessing \$300, \$200, \$100, \$15, or \$10 filing fee depending on office sought); Nevada, *see* NEV. REV. STAT. § 293.193.1 (2003) (requiring a \$300 filing fee for representatives in Congress, Governors, and Justices of the Supreme Court); Ohio, *see* OHIO REV. CODE ANN. § 3513.10(A) & (B) (Anderson 1996) (maintaining that congressional candidates pay eighty-five dollars when filing a declaration of candidacy); South Carolina, *see* S.C. CODE ANN. § 7-13-40 (Law. Co-op. 1977) (establishing filing fee equal to one percent of congressional salary for full term of office); and Wyoming, *see* WYO. STAT. ANN. § 22-5-208(a)(ii) (2003) (dictating that candidates who are voted for by electors wholly within one county pay twenty-five dollars, while candidates who are voted for by the entire state pay a \$200 fee). Because some form of exception to the monetary filing fee is required by *Bullock*, 405 U.S. 134 (1972), and *Lubin*, 415 U.S. 709 (1974), the constitutionality of these arrangements is questionable. *See, e.g.*, *Belitskus v. Pizzigrilli*, 343 F.3d 632, 650 (3d Cir. 2003) (requiring that Pennsylvania provide an alternative to filing fee for those who would be subjected to a financial hardship).

165. *See* ALA. CODE § 17-16-15 (1995) (allowing waiver of filing fee for “those able to pay”); ALASKA STAT. § 15.25.050(a) (Michie 2004) (providing that “[a]n indigent person may file a statement of indigency . . . in place of the filing fee”); ALASKA ADM. CODE tit. 6, § 25.130 (2005) (stating that “[a]ny person who is unable to pay the filing fee for candidacy,

fee-charging states authorize candidates to alternatively collect signatures.¹⁶⁶ States that authorize signature collection as alternatives to ballot fees tend to demand significantly more signatures than states that rely solely on signature collection.¹⁶⁷ For example, Florida in 1996 demanded signatures from three percent of the registered and eligible electorate,¹⁶⁸ which translated to, on average, almost 4,000 signatures for congressional (House) primaries.¹⁶⁹ Georgia in 1996 required, on average, over 2,500 signatures for its House primaries.¹⁷⁰ California continues to require 3,000 signatures for congressional (House) primaries.¹⁷¹ States that rely solely on signature collection, in contrast, generally require no more than 1,000 signatures for House races.¹⁷² Only five non-monetary states stray beyond this 1,000-signature ceiling,¹⁷³ with Massachusetts's requirement of 2,000 signatures at the apex.¹⁷⁴

and still provide for the necessities of life, may file as an indigent candidate"); MD. ELEC. LAW § 5-401(c) (2003) (stating that "filing fee . . . shall be waived if the candidate establishes inability to pay the fee" and that "a candidate may demonstrate inability to pay the filing fee by attaching . . . a sworn statement . . . set[ting] forth: (i) the nature, extent, and liquidity of the candidate's assets; and (ii) the candidate's disposable net income"); NEB. REV. STAT. § 32-608(5) (2004) (disposing of fee for a "pauper," defined as "a person whose income and other resources for maintenance are found under assistance standards to be insufficient for meeting the cost of his or her requirements and whose reserve of cash or other available resources does not exceed the maximum available resources that an eligible individual may own"); UTAH CODE ANN. § 20A-9-201(6)(d) (2003) (waiving fee for persons "unable to pay" upon filing of affidavit of "impecuniosity").

166. See, e.g., CAL. ELEC. CODE § 8106(a)(2) (West 2003); DEL. CODE ANN. tit. 15, § 3103(d)(1999); FLA. STAT. ANN. § 99.095(1) (West 2002); GA. CODE ANN. § 21-2-132(g) (2003); HAW. REV. STAT. § 12-6(e) (2003); IDAHO CODE § 34-626(b) (Michie 2001); KAN. STAT. ANN. § 25-4502(b) LA. REV. STAT. ANN. § 18:465.C(3)(b) (West 2004); MINN. STAT. ANN. § 204B.11(2)(b) (Supp. 2005); MO. REV. STAT. § 115.357.3 (2003); MONT. CODE ANN. § 13-10-203(2)(b) (2003); N.H. REV. STAT. ANN. § 655:19-c.III (1996); N.C. GEN. STAT. § 163-107.1(c) (2003); OKLA. STAT. tit. 26, § 5-112 (1997); TEX. ELEC. CODE ANN. § 172.025(2)(B) (Vernon 2003); WASH. REV. CODE § 29A.24.091 (Supp. 2005); W. VA. CODE § 3-5-8(a) (Michie 2002).

167. See Brown, *supra* note 112, at 1305-06 (observing that most pure signature states require 1,000 or less signatures, and that all but one state requires less than 1,500 signatures, and stating that "[u]nlike states which use signatures as the alternative, . . . pure signature states tend to require substantially fewer signatures").

168. FLA. STAT. ANN. § 99.095(3) (West 1996). Florida has since relaxed its requirement to one percent of the registered and eligible electorate. See 1999 Fla. Sess. Laws Serv. 99-318 (West 2000).

169. See Brown, *supra* note 112, at 1299 n.77 (noting that the number of signatures varied depending on the party and the district).

170. *Id.* at 1300 & n.85.

171. CAL. ELEC. CODE § 8106(a)(2) (West 2003); see also CAL. ELEC. CODE § 8106(a)(3) (West 2003) (requiring 10,000 signatures for Senatorial campaigns); *Andress v. Reed*, 880 F.2d 239, 242 (9th Cir. 1989) (reasoning that collecting 10,000 signatures within forty-five days was reasonable and constitutionally adequate). See generally Brown, *supra* note 112, at 1305 nn.102-03 (listing the number of signatures required by those states where signature collection is alternative to filing fee).

172. See Brown, *supra* note 112, at 1306 (indicating that "a consensus of states have found [1,000 signatures or less] manageable").

173. See *id.* at 1306 nn.105-06 (indicating that Michigan, New Mexico, New York, and South Dakota require between 1,000 and 1,500 votes).

174. See MASS. ANN. LAWS, ch. 53, § 44 (Law. Co-op. 2005) (stating that nomination

Most of the states today that authorize signature collections as alternative forms of ballot access for state and congressional offices make it available to *all* potential candidates. Rich, poor, and middle-class candidates are all treated alike. They can pay the fee or collect signatures. Eight states, however, restrict their signature collection alternatives to poor candidates: those candidates that are either “unable” to pay the required fee or are otherwise “indigent.”¹⁷⁵

Poverty definitions vary among states that either waive fees completely or condition the availability of signature collection alternatives. Of the five states that provide outright waivers, three require some form of “inability to pay.”¹⁷⁶ Two limit their waivers to “indigents”¹⁷⁷ and “paupers,”¹⁷⁸ respectively, without describing or defining these terms. Of the eight states that condition their signature collection alternatives on some measure of poverty, five require what amounts to an “inability to pay.”¹⁷⁹ Two of the three remaining states require “indigen[ce]”¹⁸⁰ and “poverty,”¹⁸¹ respectively, without specifically attaching income or ownership limits to either term. Delaware alone sets a specific monetary ceiling on who qualifies for the state’s signature collection alternative. In order to qualify to collect signatures in Delaware, a candidate must “receiv[e] benefits under the Supplemental Security Income Program for Aged, Blind and Disabled under Subchapter XVI of Chapter 7 of Title 42 of the United States Code” or qualify under the federal “income and resources tests for such benefits under 42 U.S.C. § 1382(a), as applied to Delaware

“shall be by nomination papers” and that candidates for state House primaries shall collect at least two thousand signatures).

175. See DEL. CODE ANN. tit. 15, § 3103(e). Indigents are those who receiv[e] benefits under the Supplemental Security Income Program for Aged, Blind and Disabled under Subchapter XVI of Chapter 7 of Title 42 of the United States Code . . . or if the Commissioner determines that such person meets the income and resources tests for such benefits under 42 U.S.C. § 1382(a), as applied to Delaware residents.

Id. See GA. CODE ANN. § 21-2-132(g) (2003) (obligating the candidate to, “under oath[,] affirm his or her poverty and his or her resulting inability to pay the qualifying fee”); HAWAII REV. STAT. ANN. § 12-6(e) (2003) (providing that there must be a declaration “by affidavit, that the person is indigent”); MO. REV. STAT. § 115.357.3 (2003) (requiring that candidate must file a declaration stipulating “inability to pay”); MONT. CODE ANN. § 13-10-203 (2003) (requiring a “verified statement that he is unable to pay the filing fee”); N.H. REV. STAT. ANN. tit. 63, § 655:20 (1996) (authorizing signature collection by candidates who are “unable to pay the filing fee . . . by reason of indigency”); WASH. REV. CODE ANN. § 29A.24.091 (West Supp. 2005) (waiving filing fee for “candidate who lacks sufficient assets or income at the time of filing to pay”); W. VA. CODE ANN. § 3-5-8a (Michie 2002) (mandating “oath . . . stating that he is unable to pay the filing fee due to a lack of financial resources”).

176. See *supra* note 165.

177. See *supra* note 165 (describing Alabama’s alternative).

178. See *supra* note 165 (describing Nebraska’s alternative).

179. See *supra* note 175.

180. See *supra* note 175 (describing Hawaii’s alternative).

181. See *supra* note 175 (describing Georgia’s alternative).

residents.”¹⁸² For the 2002 election, this meant that only persons with less than \$13,080 in earned income (or \$6,450 in “unearned” income) qualified for Delaware’s signature collection alternative.¹⁸³

Restrictions on presidential candidates follow the patterns described above, though states sometimes modify their rules for presidential contests. Ohio, for example, requires that candidates for state and congressional offices pay filing fees. Presidential candidates, in contrast, are not charged a fee, but are required to gather 1,000 signatures in order to run in the state’s two major party primaries.¹⁸⁴ For the most part, states tend to rely more on signature collections for presidential elections than for congressional contests. At least twenty-two states use signatures alone to restrict their presidential primary ballots.¹⁸⁵ The number of required signatures varies widely, ranging from 300 in Nebraska¹⁸⁶ to 15,000 in New York.¹⁸⁷ Many states require signatures together with fees,¹⁸⁸ a

182. See DEL. CODE ANN. tit. 15, § 3103(e) (1999) (stipulating that claimant must provide personal income tax returns, bank records, and credit reports).

183. See *Biener v. Calio*, 209 F. Supp. 2d 405, 407 n.2 (D. Del. 2002) (calculating the 2002 eligibility income thresholds under 42 U.S.C. § 1382(a)). The federal Supplemental Security Income (“SSI”) Program is designed to achieve only minimal subsistence levels. See generally *Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989) (examining the impact of in-kind support and maintenance on the calculation of benefits for the elderly, blind, and disabled under the SSI Program). Federal SSI eligibility income amounts, however, do not equate to the federal government’s “poverty threshold.” See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2002 POVERTY THRESHOLDS, SOCIAL AND ECONOMIC SUPPLEMENT (2003) (showing that a family could earn significantly more than \$13,080, the 2002 SSI eligibility amount for Delaware, and still be deemed poor under the federal poverty threshold), available at www.census.gov/hhes/poverty/threshld/thresh02.html (last visited June 22, 2005). Thus, Delaware candidates whose income fell below the federal poverty threshold but exceeded the SSI ceiling would still be required to pay a filing fee for elective office.

184. See OHIO REV. CODE § 3513.10 (Anderson 1996). By way of contrast, independent candidates must gather 5,000 signatures in order to access Ohio’s general presidential election ballot. See OHIO REV. CODE § 3513.257(A) (Anderson 1996). Whether this disparate treatment survives First and Fourteenth Amendment scrutiny is beyond the scope of this Article. See *supra* note 161 (addressing laws that require more from minor party and independent candidates than from major party candidates).

185. See Potter & Viray, *supra* note 154, at 577 tbl. 1 (listing filing fees, petition requirements, and controlling statutes for each state).

186. See NEB. REV. STAT. § 32-613 (2004) (stating that a presidential candidate must acquire 100 signatures from each of Nebraska’s three congressional districts).

187. See N.Y. ELEC. LAW § 6-136 (McKinney 1998) (requiring 15,000 signatures for presidential primary); *cf.* *Rockefeller v. Powers*, 917 F. Supp. 155, 160 (E.D.N.Y. 1996), *aff’d*, 78 F.3d 44 (2d Cir. 1996) (arguing that a law requiring 1,250 signatures or five percent of registered voters, whichever is less, be secured in each congressional district for the candidate’s name to be placed on presidential ballots was invalid because the scheme required that candidates make excessive efforts to reach most districts would have to collect 37,000 signatures to be placed on every district’s ballot).

188. See ALA. CODE § 17-16a-3-4 (1995) (delegating to parties the power to set and assess fees and also requiring 500 signatures); DEL. CODE ANN. tit. 15, § 3184 (1999) (delegating to parties power to impose fees and requiring 500 signatures); KY. REV. STAT. ANN. §§ 118.611, 118.591 (Banks-Baldwin 1998) (imposing a \$1,000 filing fee and requiring 5,000 signatures); VT. STAT. ANN. tit. 17, § 2702 (2002) (requiring \$2,000 fee and 1,000 signatures).

feature seldom seen outside the presidential arena. The fee amounts vary, ranging from \$100 in Kansas¹⁸⁹ to \$10,000 in South Carolina¹⁹⁰ and Arkansas.¹⁹¹

As with congressional contests, states that charge fees for presidential primaries most often allow alternative access, either through waivers¹⁹² or signature collections.¹⁹³ However, a handful of states have failed to authorize any form of non-monetary alternative access.¹⁹⁴ One interesting twist not found in other electoral arenas is that a dozen states, like Florida, leave it to public officials and committees, relying on media coverage, to select the presidential candidates who will appear on the major parties' primary ballots.¹⁹⁵

189. KAN. STAT. ANN. § 25-4502(b) (2000). By way of contrast, Kansas requires that candidates for state and congressional office pay fees equal to one percent of the office's annual salary. KAN. STAT. ANN. § 25-206(a) (2002).

190. See Potter & Viray, *supra* note 154, at 582 tbl. 1 (stating that the Republican Party in South Carolina charged a mandatory \$10,000 fee in the 2000 election).

191. See *id.* at 577 tbl. 1 (stating that Republican Party in Arkansas imposed a \$10,000 filing fee in 2000). Arkansas delegates to parties the power to establish and set fees. ARK. CODE ANN. § 7-7-201(b)(5) (Michie 2000). Fees tend to reach their zenith when set by the parties. See Potter & Viray, *supra* note 154, at 577-82 tbl. 1 (revealing that all fees over \$2500 were charged by parties). The fact that filing fees are set or charged by political parties rather than by the government, however, does not alter the constitutional calculus. See *Bullock v. Carter*, 405 U.S. 134, 138 (1972) (striking down Texas filing fees that were set by political parties conducting the elections).

192. See, e.g., MO. REV. STAT. § 115.761.1 (West 2003) (charging \$1,000 filing fee for presidential primary unless candidate is unable to pay); ALA. CODE § 17-16-15 (1995) (permitting parties to assess fees on candidates who are able to pay). See generally Potter & Viray, *supra* note 154, at 577-1583 tbl. 1 (indicating which states provide an option between filing fees or petitions).

193. See, e.g., KAN. STAT. ANN. § 25-4502(b) (2000) (alternatively charging a \$100 fee or requiring 1,000 signatures). See generally Potter & Viray, *supra* note 154, at 577-83 tbl. 1 (presenting in table format a state by state survey of mandatory and optional filing fees and petition requirements).

194. Arkansas, for example, which has delegated the power to accept and process applications to the parties, provides no express mechanism for waiver of any fees the parties may charge. See ARK. CODE ANN. § 7-7-201(b)(5) (Michie 2000) (leaving to the political parties nearly all responsibility for determining who may run on their respective ballots); see also KY. REV. STAT. ANN. §§ 118.611, 118.591 (Banks-Baldwin 2003) (requiring \$1,000 fee and also 5,000 signatures and recognizing no alternative to payment of the fee); 25 PA. STAT. ANN. tit. XXV §§ 2872.1, 2873 (West 1994) (requiring 2,000 signatures and a \$200 fee with no mechanism for waiver); S.C. CODE ANN. § 7-13-40 (Law. Co-op. 1977) (requiring fee equal to one percent of salary for full term of office or \$100, whichever is greater, and providing no exception); TEX. ELEC. CODE ANN. § 191.002 (Vernon 2003) (delegating to parties the power to determine qualifications for placing their candidates' names on their ballots and mandating no waiver or exception if parties require payment of a fee); VT. STAT. ANN. tit. 17, § 2702 (2002) (requiring \$2,000 fee unless "the candidate and the candidate's campaign committee are without sufficient funds to pay the filing fee, the secretary of state shall waive all but \$300.00 of the payment of the filing fee by that candidate"). All of these laws are questionable under *Bullock* and *Lubin*. See *Belitskus v. Pizzigrilli*, 343 F.3d 632, 651 (3d Cir. 2003) (striking down Pennsylvania filing fee for state office to extent it provided no waiver).

195. See DIVISION OF ELECTIONS, FLA. DEP'T OF STATE, 2004 FEDERAL QUALIFYING HANDBOOK 3 (2003) (explaining the process by which a candidate's name may be removed from the primary ballot if members of a selection committee agree), available at <http://election.dos.state.fl.us/publications/pdf/2004FedQualHand.pdf> (last visited June 22,

III. COMPARING PROPERTY QUALIFICATIONS

As explained above,¹⁹⁶ the Equal Protection analysis found in *Bullock* and *Lubin* is generally understood to require some form of non-monetary ballot access for state and federal elections. The Third Circuit in *Belitskus v. Pizzigrilli*,¹⁹⁷ for example, recently invalidated Pennsylvania's \$100 and \$200 filing fees for local offices because they lacked exceptions or alternatives.¹⁹⁸ However, *Bullock* and *Lubin* have not been interpreted to preclude states from charging *substantial* fees. In *Green v. Mortham*,¹⁹⁹ the Eleventh Circuit, in light of Florida's generally available signature collection alternative, sustained Florida's \$10,020 filing fee for congressional office.²⁰⁰

Lower courts, moreover, have not read *Bullock* and *Lubin* to require non-monetary alternative access for *all* candidates. In *Biener v. Calio*,²⁰¹ the same Third Circuit that invalidated Pennsylvania's fees for want of any exceptions sustained Delaware's non-monetary alternative that was available only to candidates who earned less than \$13,080.²⁰² Nor have lower courts demanded realistic alternatives. The court in *Green v. Mortham*, after sustaining Florida's \$10,000-plus fee for congressional office, found that Florida's signature collection alternative—which required, on average, about 4,000 signatures for House primaries—was reasonable under *Bullock* and *Lubin*.²⁰³ The fact that few candidates were able to collect such a large number of signatures did not convince the court that the number was constitutionally problematic.²⁰⁴

The lesson from cases like *Green* and *Biener* is that any waiver or

2005); Potter & Viray, *supra* note 154, at 556 (relaying that “statutes in twelve states require the Secretary of State or a selection committee, with the Secretary of State often acting as chair, to place on the ballot only those presidential candidates generally recognized as candidates by the national and/or local media.”). The validity of these laws falls beyond the scope of this Article. See generally *LaRouche v. Kezer*, 990 F.2d 36, 39 (2d Cir. 1993) (sustaining a media recognition statute that authorized inclusion on presidential ballot of minor candidates who were generally recognized by press as an alternative to submitting signed petitions).

196. See *supra* notes 149-152 and accompanying text.

197. 343 F.3d at 632.

198. See *id.* at 644 (reasoning that the mandatory fees placed a severe burden on the rights of indigent candidates and their supporters).

199. 155 F.3d 1332 (11th Cir. 1998).

200. See *id.* (finding no evidence that the increased fee had reduced the numbers of candidates filing for office and concluding that the alternative petition method was not onerous).

201. 361 F.3d 206 (3d Cir. 2004).

202. See *id.* at 212-15 (noting that Equal Protection jurisprudence requires alternatives to fees only for those who are unable to pay).

203. 155 F.3d at 1337 (recalling that the Supreme Court had upheld petition standards for minor parties requiring collections of more signatures within shorter periods of time).

204. *Id.* See Brown, *supra* note 112, at 1299-1300 (observing that in 1992, 1994, and 1996, only one in four of the 204 House primary candidates in Florida qualified under this signature alternative). The other three-quarters resorted to paying Florida's ballot fee. *Id.*

exception will do under the First and Fourteenth Amendments, even if the alternative is legally or realistically impossible for most candidates. While I do not agree that the Third and Eleventh Circuits are correct in their interpretations of *Bullock* and *Lubin*, I must concede that their views accurately reflect the dominant judicial philosophy today.²⁰⁵ Courts simply have refused to employ the Equal Protection Clause's comparative tools to invalidate either unreasonable ballot fees or unrealistic non-monetary alternatives. The end result is a composite of substantial ballot fees without adequate alternative access, all with the blessings of the Equal Protection Clause.

A. *Equal Protection Limitations on Property Qualifications*

As explained above, property qualifications for electors and candidates date to the founding of the Republic.²⁰⁶ Indeed, they persisted well into the Twentieth Century. As late as 1951, for example, the Supreme Court had no difficulty summarily affirming a Virginia poll tax.²⁰⁷ It was not until the adoption of the Twenty-fourth Amendment in 1964 that poll taxes were outlawed in *federal* elections.²⁰⁸ Two years later in *Harper v. Virginia State Board of Elections*²⁰⁹ the Supreme Court ruled that poll taxes in *state* elections violated the Equal Protection Clause. After the Supreme Court's 1969 decision in *Kramer v. Union Free School District No. 15*,²¹⁰ which struck down a New York school board election law requiring voters to either have children in the schools or possess taxable real property, and its

205. *But see* *Dixon v. Md. State Admin. Bd. of Election Laws*, 878 F.2d 776, 786 (4th Cir. 1989) (striking down Maryland filing fee for local office even though it provided a waiver for indigents).

206. *See supra* notes 44-46, 55-57 and accompanying text.

207. *See* *Butler v. Thompson*, 341 U.S. 937, 937 (1951) (affirming without opinion the lower court's judgment upholding Virginia poll tax); *see also* *Breedlove v. Suttles*, 302 U.S. 277, 279-80 (1937) (sustaining Georgia poll tax applicable to all males between the ages of twenty-one and sixty and exempting blind individuals and females who chose not to register).

208. U.S. CONST. amend. XXIV, § 1.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Id.

209. 383 U.S. 663 (1966). The federal Voting Rights Act of 1965 also cast doubt on the use of poll taxes in state elections. *See* CRS ANALYSIS, *supra* note 66, at 1875-76 (noting that Voting Rights Act of 1965 "impugned the continuing validity of the poll tax as a qualification in state elections") (footnote omitted). The federal government brought several suits under the Voting Rights Act to overturn poll taxes charged in state elections. *See, e.g.,* *United States v. Tex.*, 252 F. Supp. 234, 255 (W.D. Tex.), *aff'd on other grounds*, 384 U.S. 155 (1966) (concluding that poll tax was invalid under *Harper*).

210. 395 U.S. 621 (1969); *see* *Cipriano v. Houma*, 395 U.S. 701, 706 (1969) (invalidating a Louisiana requirement that voters in an election to approve a revenue bond must be property taxpayers).

1970 opinion in *Phoenix v. Kolodzieiski*,²¹¹ which struck down Arizona's property taxpayer requirement for general bond elections, it was generally understood that property ownership and taxpayer requirements for voters violated the Equal Protection Clause.²¹²

In 1970, the Supreme Court cautiously extended this reasoning from voters to elected and appointed officials in *Turner v. Fouche*.²¹³ Though noting that it was not "excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding could survive constitutional scrutiny,"²¹⁴ the Court in *Turner* invalidated under the Equal Protection Clause a Georgia freeholder requirement for local school board membership.²¹⁵

Because of *Turner's* careful language, the Court's application of only a rational basis test, and the long-standing precedent sustaining lengthy *residence* requirements for state office-holders²¹⁶ (as opposed to electors),²¹⁷ *Turner* left open the possibility of property requirements for elected officials.²¹⁸ A minimal freeholder requirement, after all, is only slightly more burdensome than a seven-year residence requirement.²¹⁹ Representatives, moreover, had historically been subjected to qualifications that were not applied to electors.²²⁰ Thus, demanding property of representatives, but not of voters, could be rationalized by historical example.

However, following the Supreme Court's summary reversal of a lower court's judgment sustaining a Louisiana freeholder requirement for

211. 399 U.S. 204 (1970).

212. *But see* *Salier Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 735 (1973) (upholding California law allowing only landowners to vote in water storage district elections); *Ball v. James*, 451 U.S. 355, 372 (1981) (sustaining "one-acre-one-vote" scheme for electing directors of Arizona water district).

213. 396 U.S. 346 (1970).

214. *Id.* at 364.

215. *See id.* (holding that the requirement of owning real property failed to advance any rational state interest).

216. *See, e.g.,* *Chimento v. Stark*, 414 U.S. 802, 802 (1973) (upholding New Hampshire's seven-year residence requirement for gubernatorial candidates); *Kanapaux v. Ellisor*, 419 U.S. 891, 891 (1974) (affirming five-year residence requirement for South Carolina candidates for governor); *Sununu v. Stark*, 420 U.S. 958, 958 (1975) (sustaining seven-year residence requirement for New Hampshire state senator).

217. *See* *Dunn v. Blumstein*, 405 U.S. 330, 330 (1972) (striking down one-year residence requirement for franchise on the basis it did not advance any compelling state interest). *But see* *Marston v. Lewis*, 410 U.S. 679, 684-85 (1973) (declaring fifty-day residence requirement, coupled with cut-off of voter registration fifty days prior to election, valid in order to permit accurate preparation of voter rolls).

218. 396 U.S. at 362 (refraining from deciding whether requirements for office holders—as opposed to voters—required the support of a compelling state interest).

219. *See* *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159, 159-60 (1977) (Rehnquist, J., dissenting) ("It is dubious at best whether the requirement that a public officeholder own any assessable property within a parish is any more burdensome, or any less rational, than a requirement that he and his family live in that parish.").

220. *See supra* notes 50-57 and accompanying text.

appointment to a local airport commission,²²¹ and its 1989 decision in *Quinn v. Millsap*²²² overturning a Missouri freeholder requirement for appointed office, hope for ownership requirements faded. Although the Supreme Court again applied only rationality review in *Quinn*,²²³ and even though the Missouri office at issue had a limited scope, the Court's broad announcement that a "demonstrated commitment to the[] community" was more important than ownership seemed to spell the death knell for property qualifications for public office.²²⁴

Quinn makes clear that property *ownership* requirements for representatives are constitutionally questionable under the Equal Protection Clause.²²⁵ While not a perfect correlation, one might say that *Quinn* is to candidates what *Kramer* is to voters. By reasonable extrapolation, one can also confidently say that property *taxpayer* requirements for candidates fail scrutiny under the Equal Protection Clause. Unlike with voters, however, the fallout of *Bullock* and *Lubin* also establishes that candidates can be charged for the privilege of participating in the political process.²²⁶ Equal Protection may demand absolute fiscal equality among voters, but it still tolerates financial obstacles in the paths of representatives.

B. The Federal Qualifications Clauses

Sections 2 and 3 of Article I define qualifications for federal representatives and senators, respectively. Section 2 states: "No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."²²⁷ Section 3 states: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."²²⁸ Section 1 of Article II, in turn, defines the qualifications of the President:

221. *Chappelle*, 431 U.S. at 159.

222. 491 U.S. 95 (1989).

223. *See id.* at 107 n.10 (holding that because land-ownership requirements for all members of a board of freeholders could not survive *Turner*'s rationality basis scrutiny, it was not necessary to consider whether strict scrutiny applied).

224. *See id.* at 109 (observing that the board of freeholders had powers that affected everyone in the community, whether or not they owned land).

225. *See id.* (remarking that property ownership is an invalid requirement for election or appointment to any body with the power to change local government and to affect all citizens).

226. *See, e.g., Lubin v. Panish*, 415 U.S. 709, 718 (acknowledging fees as an effective means of managing the number of candidates on the ballot but requiring alternative methods of qualification).

227. U.S. CONST. art. I, § 2, cl. 2.

228. U.S. CONST. art. I, § 3, cl. 3.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.²²⁹

These provisions collectively set out the age, citizenship and residence requirements for federal elected office.

In *Powell v. McCormack*,²³⁰ the Supreme Court ruled that *Congress* could not add qualifications to those established by Article I. Rather, Article I's age, residence, and citizenship requirements are fixed from the federal standpoint.²³¹ In *Powell*, the federal House of Representatives sought to deny one of its 435 seats to Adam Clayton Powell, who had been duly elected from the 18th Congressional District of New York.²³² Powell was suspected of making illegal salary payments to his wife and deceiving House authorities as to travel expenses during his incumbency.²³³ Rather than vote to expel Powell,²³⁴ the House voted to exclude him following his re-election²³⁵ under Article I, Section 5, clause 1, which delegates to "Each House" the power to "Judge the Elections, Returns, and Qualifications of its own Members." While it conceded that Powell satisfied the age, residence, and citizenship qualifications found in Article I, the House membership concluded that his wrongdoing rendered him otherwise unqualified and justified his exclusion.²³⁶

Powell challenged his exclusion in federal district court. The defendants, who included the House leadership and its Sergeant at Arms, responded that whether Powell could be excluded presented a nonjusticiable, political question.²³⁷ In the course of answering this question, the Supreme Court, per Chief Justice Warren, concluded that

229. U.S. CONST. art. II, § 1, cl. 4. Of course, the President is not elected directly, but is elected by members of the Electoral College, who are themselves "appoint[ed], in such manner as the [state] Legislature[s] . . . may direct" U.S. CONST. art. II, § 1, cl. 2. The Constitution does not spell out the qualifications for the members of the Electoral College. Consequently, the presumption is that, for constitutional purposes, these electors are to be treated as any other state officeholder. See *U.S. Term Limits v. Thornton*, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting) ("Even respondents do not dispute that the States may establish qualifications for their delegates to the electoral college, as long as those qualifications pass muster under other constitutional provisions (primarily the First and Fourteenth Amendments).").

230. 395 U.S. 486 (1969).

231. See *id.* at 547 (holding that Congress's power to exclude elected members must be construed narrowly to protect the right of the people to choose who governs them).

232. *Id.* at 489.

233. *Id.* at 489-90.

234. Expulsion is authorized by the Constitution, which states that "[e]ach House may . . . , with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5, cl. 2.

235. U.S. CONST. art. I, § 5, cl. 1.

236. *Powell*, 395 U.S. at 492-93.

237. *Id.* at 495.

Article I's qualifications were fixed and could not be altered by the Congress.²³⁸ Given these fixed qualifications, Powell's exclusion for other reasons²³⁹ presented a justiciable question that fell within the jurisdiction of Article III courts.²⁴⁰ Indeed, because the House's action was inconsistent with the plain command of Article I, Powell's exclusion was unconstitutional.²⁴¹

The Supreme Court's conclusion that Congress cannot alter or supplement Article I's age, residence, and citizenship requirements is not controversial today. Indeed, Justice Stewart's lone dissent in *Powell* was based on mootness as opposed to Article I's scope,²⁴² and the Court's modern makeup has unanimously embraced *Powell*'s result.²⁴³ This is not to say that the modern Supreme Court agrees on *why* Congress is prohibited from changing Article I's qualifications; to the contrary, the Court is closely divided over the reason. But the Justices at least agree on an absence of *federal* power in this regard.

The Court's disagreement over *Powell*'s rationale was pushed to the forefront by Arkansas's decision in 1992 to rotate its federal representatives. By popular initiative, Arkansas amended its constitution to limit its representatives in the federal Senate and House to two and three terms, respectively.²⁴⁴ In *U.S. Term Limits v. Thornton*,²⁴⁵ a thin five-to-four majority struck down Arkansas' term limits under Article I and the authority of *Powell*.²⁴⁶ The majority, per Justice Stevens, found that

238. *Id.* at 548.

239. The Court concluded that whether an elected official *met* the qualifications prescribed by Article I presented a nonjusticiable, political question. *Id.* at 523. Hence, Powell could have been excluded—without effective federal judicial review—for not meeting the age, residence and citizenship requirements of Article I. *See id.* (“Petitioners concede—and we agree—that if Powell had not met one of the standing qualifications set forth in the Constitution, he could have been excluded under Article I, § 5.”). The House, however, conceded that Powell met these qualifications. *Id.* at 550. Powell could also have been expelled under Article I by a two-third majority vote after being seated. *Id.* at 507. Even though Powell was excluded by over a two-third's majority, the Court concluded that his exclusion could not be equated with expulsion. *Id.* at 511-12.

240. *Id.* at 549. “The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States . . .” U.S. CONST. art. III, § 2, cl. 1.

241. *Powell*, 395 U.S. at 550.

242. *See id.* at 559 (Stewart, J., dissenting) (arguing that Powell's subsequent election and seating mooted the controversy).

243. *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 779 (1995) (holding that *Powell* also prevents states from changing or adding to Article I's stated qualifications); *id.* at 875 (Thomas, J., dissenting) (“I agree with the majority that Congress has no power to prescribe qualifications for its own Members.”).

244. *See id.* at 784 (describing the state constitutional amendment's limits on both state and federal elected officials). Actually, Arkansas' constitutional amendment was more technical. It prevented those who had served three or more terms in the House or two or more terms in the Senate from being “certified as [] candidate[s]” and being “eligible to have [their] name[s] placed on the ballot[s] . . .” *See id.* (quoting ARK. CONST. amend. 73, § 3). This aspect of the case is discussed below.

245. 514 U.S. at 779.

246. *See id.* at 837 (concluding that qualifications for federal office could only come

Powell's rationale applied equally to the states.²⁴⁷ The more conservative four-Justice dissent, in contrast, found that although *Powell* was right about a general lack of federal power, it was wrong to conclude that Article I's qualifications were fixed and unalterable.²⁴⁸ And because they were not fixed, the dissent argued, Article I's qualifications could be supplemented by the states.

Powell relied almost exclusively on the Framers' original understanding of what Article I's Qualification Clause was meant to establish. Prior to the Constitutional Convention of 1787, English precedent recognized both standing qualifications, which if not met could result in exclusion,²⁴⁹ and Parliament's authority to expel members for misdeeds that would not justify exclusion.²⁵⁰ The Court focused on "the most notorious English election dispute of the 18th century:"²⁵¹ the expulsion and subsequent exclusion by Parliament of John Wilkes.²⁵²

While serving in the House of Commons in 1763, Wilkes "published an attack on a recent peace treaty with France."²⁵³ Following his arrest, Wilkes was expelled from the House.²⁵⁴ After his exile and return to England, Wilkes was elected again in 1768,²⁵⁵ imprisoned, and elected again three times thereafter. "[E]ach time the same Parliament declared him ineligible and refused to seat him."²⁵⁶ Following Wilkes's release, the House of Commons in 1782 voted to expunge his expulsions, resolving that "the prior House actions were 'subversive of the rights of the whole body of electors of this kingdom.'"²⁵⁷

With the successful resolution of Wilkes' long and bitter struggle for the right of the British electorate to be represented by men of their own choice, it is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that "the law of the land had

through amendment of the federal Constitution).

247. *See id.* (emphasizing that the Framers of the Constitution intended qualifications to be uniform across all states).

248. *See id.* at 845 (Thomas, J., dissenting) (arguing that since the Constitution was silent on whether states can add to the qualifications required of its representatives, that power is reserved by the states).

249. *See Powell v. McCormack*, 395 U.S. 486, 522-23 (1969) (observing that clergy in England were ineligible for election to the House of Commons and thus could be excluded).

250. *See id.* at 524-25 (describing several instances in which Parliament expelled members "for misdeeds not encompassed within recognized standing incapacities existing either at the time of the expulsions or at the time the Constitution was drafted in 1787") (footnote omitted).

251. *Id.* at 527.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 528.

257. *Id.*

regulated the qualifications of members to serve in parliament” and those qualifications were “not occasional but fixed.”²⁵⁸

The House of Commons’ expunction of Wilkes’s expulsions “repudiated any ‘control over the eligibility of candidates, except in the administration of the law which define their (standing) qualifications.’”²⁵⁹ “Wilkes’ struggle and his ultimate victory,” the *Powell* Court concluded, “had a significant impact in the American colonies.”²⁶⁰ “Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty.”²⁶¹

Just five years removed from Wilkes’s struggle and success, the Convention set its hand to drafting qualifications for federal office. The Framers, with little debate, agreed to the propriety of age requirements for both Houses,²⁶² though it did not settle on anything specific. It instead instructed its Committee of Detail to draft a document incorporating this suggestion,²⁶³ as well as George Mason’s proposed property qualification.²⁶⁴ The Committee reported back no change in the age requirement, but recommended adding citizenship and residency requirements for membership.²⁶⁵ The Convention thereafter unanimously adopted the three qualifications embodied in Art. I, Section 2.²⁶⁶

Two days after adopting these qualifications, the Convention addressed the Committee’s recommendation that the Congress be given the power to “establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient.”²⁶⁷ James Madison, among others,²⁶⁸ responded that this was an “improper & dangerous power,”²⁶⁹ and that qualifications “ought to be fixed by the Constitution.”²⁷⁰ “Significantly, Madison’s argument was not aimed at the imposition of a property qualification as such, but rather at the delegation

258. *Id.*

259. *Id.* at 529.

260. *Id.* at 530.

261. *Id.* at 531.

262. *Id.* at 532.

263. *Id.*

264. *Id.* at 533. Mason had moved that a clause “‘requiring certain qualifications of landed property & citizenship’ and disqualifying from membership in Congress persons who had unsettled accounts or were indebted to the United States” be inserted. *Id.* at 532 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 121 (M. Farrand ed., 1911)). The “disqualification of debtors and the limitation to ‘landed’ property” were eliminated and the Committee of Detail was instructed “to draft a property qualification.” *Id.* at 533 (citing Farrand, *supra*, at 130-31).

265. *Id.*

266. *Id.*

267. *Id.*

268. Benjamin Franklin objected that “some of the greatest rogues he was ever acquainted with, were the richest rogues.” *Id.* at 534 n.64 (citation omitted).

269. *Id.*

270. *Id.*

to the Congress of discretionary power to establish any qualifications.”²⁷¹ The Convention thereafter rejected the Committee’s proposal. Later that same day, however, the Convention authorized each House to be the judge of its own members’ qualifications²⁷² and imposed a super-majority requirement on expulsion.²⁷³ According to the Supreme Court in *Powell*, “the Convention’s decision to increase the vote required to expel, . . . while at the same time not similarly restricting the power to judge qualifications, is compelling evidence that they considered the latter already limited by the standing qualifications previously adopted.”²⁷⁴ The history and text surrounding Article I thus was found by the *Powell* Court to converge on a clear, if not obvious, holding: “in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.”²⁷⁵

In hindsight, *Powell* was an easy case. The Constitution did not specifically assign to Congress the power to define the qualifications of its elected members. It did not even empower Congress to define the qualifications of voters. Article I directed each House to judge the qualifications of its members, and provided each House a mechanism, a supermajority vote, to expel members for reasons unrelated to qualifications. Even without the history described in *Powell*, it would seem difficult to allow Congress an added power to add qualifications by simple majority vote.

States, unlike Congress, enjoy general powers under the U.S. Constitution.²⁷⁶ Article I, Section 2 additionally recognizes the states’ rights to define qualifications of *voters* in state and federal elections: “the Electors in each State shall have the Qualifications requisite for Electors of

271. *Id.* at 534.

272. *Id.* at 536.

273. *Id.*

274. *Id.* The Court further based its conclusion on the debates that surrounded the state ratifying conventions. Hamilton, in particular, argued that the Constitution’s qualifications were fixed. *Id.* at 540-41. It also addressed Congressional practices following ratification, which the Court found to be “erratic.” *Id.* at 544. Congress was first confronted with the issue when the eligibility of William McCreery was challenged because he did not meet his home state of Maryland’s durational residence requirement. *Id.* at 542. The House Committee of Elections recommended that McCreery be seated, since “neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them.” *Id.* at 543. This remained the approach until 1868, when “the House voted for the first time in its history to exclude a member-elect.” *Id.* at 544. Noting the lack of any consistent Congressional pattern, the Court afforded this history little import. *See id.* at 546-47 (remarking that even if Congress had been consistent, a repeated unconstitutional practice would have little or no precedential value).

275. *Id.* at 550.

276. *See* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

the most numerous Branch of the State Legislature.”²⁷⁷ Section 3 provides that Senators “shall be . . . chosen by the Legislature[s of the States].”²⁷⁸ As for President, Article II delegates to the state legislatures the power to “appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress”²⁷⁹ Article VI then limits state power by stating that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”²⁸⁰

Given the states’ general powers, the specific recognitions and delegations of electoral power found in Articles I and II, and the explicit rejection in Article VI of religious tests, a credible case can be made for state power to add non-religious qualifications to the age, residence, and citizenship requirements spelled out by Article I (and even Article II).

The Supreme Court in *Thornton* relied heavily on the history recited in *Powell* to overcome these textual and structural distinctions.²⁸¹ It also added to the historical record by pointing out that *no court* had ever sustained a state’s added qualifications, whether the addition was “in the form of term limits, district residency requirements, loyalty oath requirements, [or] restrictions on those convicted of felonies.”²⁸² Early commentators of the likes of Joseph Story and Thomas Cooley, the Court found, were similarly unanimous.²⁸³ Moreover, the Court observed that following the ratification of the Constitution, few states attempted to extend additional qualifications demanded of local elected officials, like freeholder status, to their federal counterparts. “Only one State, Virginia, placed similar [property] restrictions on Members of Congress, requiring that a

277. U.S. CONST. art. I, § 2, cl. 1.

278. U.S. CONST. art. I, § 3, cl. 1. This was changed by the Seventeenth Amendment, ratified in 1913, which now requires that Senators be “elected by the people [of each State] for six years; and . . . [t]he electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.” U.S. CONST. amend. XVII. Whether judged by Article I or the Seventeenth Amendment, it is clear that the states define the qualifications of the Senate’s electors—be they members of the various state legislatures or the population at-large.

279. U.S. CONST. art. II, § 1, cl. 2. The one proviso is that “no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.” *Id.*

280. U.S. CONST. art. VI, cl. 3. Article I’s Incompatibility Clause additionally prohibits any “Person holding any Office under the United States” from being “a Member of either House during his Continuance in Office.” U.S. CONST. art. I, § 6, cl. 2.

281. 514 U.S. 779, 789-93 (1995) (recalling that the Framers feared that the ability of Congress to add qualifications for office could easily lead to abuses of power).

282. *Id.* at 798-99 (citations omitted). The Court cited an impressive array of cases dating back to 1918 striking down these additional requirements. *Id.*

283. *Id.* at 799-800 (citations omitted). More recent commentators, the Court recognized, have offered divergent views on the authority of states to add term limits to congressional office. *See id.* at 800 n.14 (providing examples of various writers’ views published in law review articles).

representative be, inter alia, a ‘freeholder.’”²⁸⁴ In contrast, “several States, including New Hampshire, Georgia, Delaware, and South Carolina, revised their Constitutions at around the time of the Federal Constitution,”²⁸⁵ and maintained property qualifications for local elected officials, “yet placed no property qualification on [their] congressional representatives.”²⁸⁶

The contemporaneous practice surrounding rotation painted a similar portrait. “At the time of the Convention, States widely supported term limits in at least some circumstances. The Articles of Confederation contained a provision for term limits.”²⁸⁷ Notwithstanding “widespread support, no State sought to impose any term limits on its own federal representatives.”²⁸⁸

It was true, as Justice Thomas pointed out in dissent, that several states extended district and durational residence requirements to their federal representatives.²⁸⁹ The latter requirement, however, could have been understood as merely an attempt at implementing Article I’s residence requirement. No federal definition of Article I’s inhabitation requirements,²⁹⁰ after all, existed, and state laws could reasonably have been expected to fill this void without necessarily adding qualifications. Given that states commonly defined “citizenship” differently for national and local purposes,²⁹¹ it was only natural that they would understand and define residence in different ways. Durational residence, then, was likely not understood to be an additional qualification; rather, it was simply an explanation of Article I’s inhabitation requirements.²⁹²

The not uncommon practice of requiring district residence is more troubling. One might, as did the majority in *Thornton*, consider this requirement a “necessary analog”²⁹³ to the common (and permissible) use

284. *Id.* at 823-24. “Just 15 years after imposing a property qualification, Virginia replaced that requirement with a provision requiring that representatives be only ‘qualified according to the constitution of the United States.’” *Id.* at 824.

285. *Id.*

286. *Id.* at 825.

287. *Id.*

288. *Id.* at 826.

289. *See id.* at 905 (Thomas, J., dissenting) (noting that at least three states that had adopted the district and durational residence requirements where representatives had to have lived in their districts for a minimum of one year, and in one state, three years). Additionally, several states also used “district-based selection processes” during the first three presidential elections. *See id.* at 904 (Thomas, J., dissenting) (noting that “2 of the 10 States that participated in the first Presidential election in 1788, 3 of the 15 States that participated in 1792, and 5 of the 16 States that participated in 1796” used districts).

290. U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. I, § 2, cl. 2.

291. *See Thornton*, 514 U.S. at 872-73 (Thomas, J., dissenting) (“Before the Constitution was adopted, citizenship was controlled entirely by state law, and the different States established different criteria Accordingly, the constitutional requirement that Members of Congress be United States citizens meant different things in different States.”).

292. U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. I, § 2, cl. 2.

293. *See Thornton*, 514 U.S. at 826 n.41 (“States may simply have viewed district residency requirements as the necessary analog to state residency requirements.”). *Id.* It

of districts.²⁹⁴ Otherwise, a single candidate might be selected in several districts and ultimately hold title to more than one congressional seat. This risk is easily solved by modern ballot laws, which restrict each candidate to a single seat. But official ballots did not exist in early America. It is thus understandable that five of the seven states that used districts also demanded district residence of their representatives.²⁹⁵ The two states that did not require district residence²⁹⁶ might have either concluded that Article I blocked such a requirement,²⁹⁷ or felt that the risk of a candidate's winning more than one seat was too remote to justify such an imposition.²⁹⁸

Regardless of the motivation, it would seem that a district residence requirement constituted just as much of an additional qualification in 1789 as it does today.²⁹⁹ The fact that five states in 1789 imposed this additional requirement impeaches the majority's claim that Article I's qualifications were generally understood by the states to be fixed.³⁰⁰

While I am not convinced that the majority in *Thornton* was fully correct³⁰¹—that is, there is credible historical evidence to suggest that Article I was not generally understood to preclude *all* additional qualifications that might be imposed by the state—the *Thornton* majority was at least right about two commonly imposed qualifications: rotation and property ownership. Rather than looking at Article I as including

would seem that a district residence requirement would be better understood as an analog to districting, rather than residence. Duration is better understood as an analog to residence.

294. The Framers fully envisioned the use of districts to select representatives. *Id.* at 905 n.30 (Thomas, J., dissenting) (“[T]he Framers wanted to let States decide for themselves whether to use district elections in selecting Members of the House of Representatives.”).

295. These five states were Georgia, Maryland, Massachusetts, North Carolina, and Virginia. *Id.* at 905 n.31 (Thomas, J., dissenting).

296. These two states were New York and South Carolina. *Id.* at 908 n.34 (Thomas, J., dissenting).

297. For example, many in the Massachusetts House of Representatives questioned the state's power under the Constitution to add a district residence requirement. *Id.* at 906 (Thomas, J., dissenting). Still, Massachusetts imposed a district residence requirement on its federal representatives. *Id.*

298. I thus do not agree with Justice Thomas that “[i]f the States had considered district residency requirements necessary for the success of a district election system, but had agreed with the majority that the Constitution prohibited them from supplementing the constitutional list of qualifications, then they simply would have . . . used statewide elections.” *Id.* at 909 (Thomas, J., dissenting). Instead, a state could have simply concluded that while district residence would have avoided certain problems, it was simply not worth it given the remoteness of any perceived difficulties.

299. The majority in *Thornton*, after all, pointed to district residence as one additional qualification that was *properly* struck down. 514 U.S. at 799. District residence requirements for congressional office are thus invalid under Article I.

300. Thus, it would seem that Florida's addition of a competency requirement, *id.* at 917 (Thomas, J., dissenting), ought to not necessarily prove invalid. Similarly, Illinois' ban on prisoners serving in federal office, *id.*, should not be rejected out-of-hand under *Thornton*. Nor should Georgia's bar on certain convicted felons. *Id.* Last but not least, it may be that states—like Rhode Island—can properly limit congressional office to qualified voters. *Id.*

301. *Id.* at 783 (concluding that “[a]llowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States”).

maximal or minimal qualifications, Article I might better be viewed through the lenses of specific requirements. Rotation was not uncommon in Revolutionary America—it was required by the Articles of Confederation³⁰²—yet was unanimously rejected by the members of the Constitutional Convention.³⁰³ In light of the fact that rotation was considered by the Convention, unanimously rejected, and not imposed on federal representatives following ratification, it is logical to assume that the practice proved inconsistent with the contemporaneous understanding of Article I. A qualification's common application and consideration, coupled with its rejection and subsequent abandonment, offer strong support for preclusion under Article I.³⁰⁴

Although not as convincing, the same would seem true of property ownership. Property qualifications were generally applied to representatives throughout the states.³⁰⁵ Property qualifications were also considered by the delegates at the Constitutional Convention; specifically, the Framers discussed whether to authorize Congress to “establish such uniform qualifications of the members of each House, with regard to property, as [Congress] shall seem expedient.”³⁰⁶ The Convention's express rejection of this power³⁰⁷ clearly disabled the Congress. When coupled with the states' near-total abandonment of the idea for federal office following ratification,³⁰⁸ one sees evidence of a general rejection of property qualifications for congressional office in post-Convention America.

For similar reasons, it would appear reasonably clear that states cannot demand property ownership of presidential candidates.³⁰⁹ This is not because Article II's qualifications are fixed; rather, it flows from the

302. *See id.* at 825 (noting that the Articles of Confederation contained a provision indicating term limits).

303. *Id.* at 812 n.22.

304. Another common state qualification, religion, was considered and expressly rejected by the text of Article VI. *See id.* at 825 n.35. I recognize that Article VI cuts against my argument. But the force of using express terms to preclude religious qualifications is not so powerful that it prevents implying any additional preclusions.

305. *See id.* at 807 n.18 (noting that a majority of states at the time of the founding had property qualifications for their representatives). *See also supra* notes 54-58 and accompanying text (describing property qualifications of founding generation).

306. 514 U.S. at 885 n.18 (Thomas, J., dissenting) (citing Farrand, *supra* note 264, at 248-51).

307. *Id.*

308. Only Virginia imposed a property qualification, and this was repealed fifteen years later. *Id.* at 823 n.33. Courts thus had no opportunity to pass on the constitutionality of property qualifications for federal office. *Id.*

309. The matter of rotation for federal executive office has since been solved, for the most part, by the Twenty-second Amendment, which states that “[n]o person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once.” U.S. CONST. amend. XXII, § 1.

Convention's rejection of property qualifications and the states' apparent post-ratification acquiescence.³¹⁰ Contrary to the dissent's concession in *Thornton* that states have "no reserved power to establish qualifications for the office of President,"³¹¹ it would not seem illogical to allow a state the luxury of adding qualifications to those prescribed by Article II. Article II, after all, delegates to the states the power to select their representatives in the Electoral College,³¹² and requires these electors to vote for at least one person who is "not . . . an Inhabitant of the same State with themselves."³¹³ This not only suggests that the Framers envisioned additional qualifications, like state residence, for presidential candidates, it also demonstrates that the Framers knew how to combat added presidential qualifications when they saw fit. While this does not mean that states are free to stack additional qualifications on presidential candidates, it suggests that added requirements cannot be dismissed out-of-hand.

Still, the Convention's rejection of property ownership for members of Congress, its meticulous creation of the presidential nominating system known today as the Electoral College, its guarantee of a fixed executive salary without state interference,³¹⁴ and the uniform failure of states to demand property ownership on the part of presidential candidates, solidly support the conclusion that States cannot impose property qualifications on presidential candidates.

Regardless of whether the *Thornton* Court was correct about the age, residence, and citizenship requirements outlined in Articles I and II, the Equal Protection analysis found in *Turner* and *Quinn* would appear to

310. See *Thornton*, 514 U.S. at 803-04 ("States . . . 'have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president It is no original prerogative of state power to appoint a . . . president for the union.'") (second alteration in original) (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858)).

311. *Id.* at 861 (Thomas, J., dissenting).

312. The dissent correctly observed that states can "set qualifications for their Presidential electors," a point the "respondents d[id] not dispute." *Id.* at 861 (Thomas, J., dissenting). Other than Article II's requirement that the electors not hold a federal office, see U.S. CONST. art. II, § 1, cl. 2, limitations on this power are located in the First and Fourteenth Amendments. *Thornton*, 514 U.S. at 861 (Thomas, J., dissenting).

313. U.S. CONST. art. II, § 1, cl. 3.

314. See U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."). The Court in *Thornton* utilized the Congressional Salary Clause of Article I to support its conclusion that states could not impose additional qualifications on representatives. See 514 U.S. at 804 (arguing that the Salary Clause also supports the Court's "view of the Framers' vision" because it proves that "representatives owe their allegiance to the people, and not to the States"). Because, similar to Article I's Salary Clause, Article II's Salary Clause is fixed and unalterable by the States, it would appear the same is true in terms of the President. Moreover, because Article II expressly prohibits a State from giving the President more, it would seem equally clear that a State could not require that he take less.

render property ownership constitutionally immaterial to one's capacity to serve in elected office.³¹⁵ States today, unlike the founding generation, cannot demand that candidates for state offices routinely own real estate or personal assets. Nor can states limit elected office to taxpayers—whether the taxable *res* is real or personal. Simply put, ownership and taxation requirements are constitutionally suspect under the Fourteenth Amendment's Equal Protection Clause.

Because the Court's Equal Protection precedent does not upset the basic ballot fee concept, however, *Thornton's* analysis of Article I's Qualifications Clauses remains relevant to concerns over economic barriers to federal office. The question is whether state-imposed ballot fees for federal office prove consistent with the letter and spirit of Articles I and II.

IV. BALLOT FEES AS QUALIFICATIONS

For some, treating ballot fees as property qualifications is constitutionally and historically counterintuitive. Filing fees, after all, have been around for the better part of a century and have regularly been upheld in the federal courts, including the Supreme Court. Why now discover that they constitute impermissible qualifications?

There are several responses. First, the argument that ballot fees constitute impermissible property qualifications is not novel and has not been uniformly rejected. At least one state supreme court ruled that ballot fees constituted unconstitutional property qualifications for state elective office in the first quarter of the twentieth century.³¹⁶ Several other states saw their ballot fees suffer similar fates at the hands of state courts for related reasons.³¹⁷

Second, unlike their state-law counterparts, which were litigated a century ago, the restrictions placed on state ballot laws by the federal Qualifications Clauses were only recently thrust to the forefront by *Thornton*. Before *Thornton* in 1995, it was uncertain whether states were barred from adding qualifications to those spelled out in Articles I and II.³¹⁸ Granted, the Supreme Court invalidated ownership qualifications for elective office under the Equal Protection Clause in 1970.³¹⁹ But the Court's cautious approach in this field, coupled with its ballot fee precedents, left the Equal Protection Clause's reach uncertain. Even if states were precluded from adding qualifications, it appeared clear before *Thornton* was decided in 1995 that states could still use fees to regulate

315. See *supra* notes 213-225 and accompanying text.

316. See *supra* note 134 and accompanying text.

317. See *supra* notes 135-139 and accompanying text.

318. 514 U.S. at 799 (declaring unconstitutional an Arkansas law placing term limits on congressional office).

319. *Turner v. Fouche*, 396 U.S. 346 (1970).

ballots.

Third, the Qualifications Clauses bring the founding generation's original understanding to bear on the validity of ballot fees. It is one thing to argue that ballot fees, which were not uncommon in the last quarter of the nineteenth century,³²⁰ survive scrutiny under the Fourteenth Amendment. Post-bellum America, after all, understood that paper ballots would be used and fees would be charged, if not by government then by the parties that printed the ballots.³²¹ It is another thing to argue that ballot fees survive the Framers' original understanding of candidates' qualifications. Fees for ballots and offices were unheard of in 1787.³²² Indeed, the Framers rejected the thought of states demanding property ownership of their federal representatives.³²³ Further, they guaranteed that federal representatives' salaries would be set by the federal government in order to minimize local control over the electoral pool.³²⁴ Combined, these realities suggest that state-imposed *office fees* would surely have ruffled the egalitarian, anti-elitist feathers of many of the Framers.

Of course, I am not so bold to suggest the argument is easy. Original intent, as all serious constitutional scholars know, can be elusive. Because the Convention kept no official transcript, the search for original intent always raises evidentiary concerns. Additionally, there is the problem of determining *whose* intent: those who drafted the document, those who ratified it, or those who were bound by it. Still, consistent with the Supreme Court's practice, I think that one can tease some basic guidelines from the text of the Constitution, the Convention's debates, and the practices accepted and followed by those who ratified and lived by the nation's founding document.

A. Fees as Property

Electoral fees today are not *office* fees, as such, but are *ballot* fees. The Third Circuit in *Biener v. Calio*³²⁵ made much of this fact in sustaining Delaware's \$3,000 filing fee for the Democratic House primary.³²⁶ But what if electoral fees were not tied to ballot access? What if they were

320. See *supra* note 23 and accompanying text (noting that political parties printed ballots and often demanded fees from candidates).

321. See *id.*

322. See *supra* notes 96-111 and accompanying text (describing the adoption of fees by states in the early twentieth century).

323. See *supra* notes 262-275 and accompanying text.

324. See *infra* note 329 and accompanying text.

325. 361 F.3d 206, 209 (3d Cir. 2004) (sustaining Delaware's filing fee for congressional office despite challenge as an impermissible qualification under Article I's Qualifications Clause, as well under the Equal Protection and Due Process Clauses).

326. See *id.* at 212 (observing that Delaware's filing fee was designed "to keep Delaware's ballots manageable" not "to evade the constitution and exclude a class" from office).

simply incidents of holding office? Would they be no less valid? Consider, for example, a state that simply directs all elected federal officials to pay over a percentage of their salaries as a condition of holding office. Would this fee be considered an impermissible qualification?

Justifying election fees that are not tied to a state's ballot machinery would seem difficult if not impossible. Even putting aside the problem of intergovernmental tax immunities,³²⁷ which the founding generation (if one believes John Marshall) embraced,³²⁸ a state's extraction of personal property from its federal elected officials would certainly have proved problematic to the Founding Fathers. The same Framers who rejected property ownership as a condition of office, and who directed that elected federal officials receive a fixed salary set and paid by the federal government,³²⁹ would not likely have looked fondly on a state's reducing this salary by way of direct extraction.

Of course, not a word about office fees was uttered at the Constitutional Convention. Although poll taxes for voters were known to the founding generation, no state imposed fees on those elected to office.³³⁰ Indeed,

327. This doctrine prohibited one sovereignty from taxing another. The Supreme Court in *McCulloch v. Maryland*, applied this doctrine to strike down a Maryland tax levied on the Second Bank of the United States. 17 U.S. (4 Wheat.) 316 (1819). Prior to the Court's philosophical uprising in 1937, it frequently relied on this doctrine to invalidate both state taxes placed on salaries of federal officials, *see Dobbins v. Commissioner*, 41 U.S. (16 Pet.) 435, 450 (1842), and federal taxes placed on the salaries of state officials, *see Collector v. Day*, 78 U.S. (11 Wall.) 113, 128 (1871). Today, state taxes placed on the salaries of federal officials, including judges protected by Article III, are valid so long as they do not discriminate in favor of state offices. *See generally Jefferson County v. Acker*, 527 U.S. 423 (1999) (upholding a county occupation tax levied against federal judges).

328. *See McCulloch*, 17 U.S. (4 Wheat.) at 437 (holding that states cannot constitutionally tax federal institutions).

329. The President is guaranteed "Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected." U.S. CONST. art. II, § 1, cl. 7. Though not expressly protected from diminution, Senators and Representatives were also guaranteed "Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States." U.S. CONST. art. I, § 6. The *Thornton* Court used the latter provision to bolster its conclusion that the qualifications in Article I are exclusively for members of Congress. "Madison argued that, congressional compensation should be fixed in the Constitution [to avoid representatives'] 'improper dependence' [on the states]." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 809 (1995) (citing Farrand, *supra* note 264, at 216). "George Mason [concurrent], noting that 'the parsimony of the States might reduce the provision so low that . . . the question would not be who were most fit to be chosen, but who were most willing to serve.'" *Id.* at 809-10 (citing Farrand, *supra* note 264, at 216). Nathaniel Gorham also agreed, observing that "the State Legislatures . . . were always paring down salaries in such a manner as to keep out of offices men most capable of executing the functions of them." *Id.* at 810 (citing Farrand, *supra* note 264, at 372). Edmund Randolph further concluded that allowing the states to set salaries would lead to "dependence . . . that would vitiate the whole System." *Id.* (citing Farrand, *supra* note 264, at 372). Hence, the *Thornton* majority concluded that "[i]n light of the Framers' evident concern that States would try to undermine the National Government, they could not have intended States to have the power to set qualifications." *Id.* A system that directed federal salaries to be set by the federal government would naturally resist direct salary reductions by way of office fees at the hands of the states.

330. The Framers were familiar with poll taxes placed on voters. *See supra* note 47 and

because election at this juncture in American history was considered more a duty than a luxury, the Framers likely would have frowned upon state laws that were designed to deter otherwise-qualified candidates. George Mason, for example, complained that allowing states to set federal salaries “might reduce the provision so low that . . . the question would be not who were most fit to be chosen, but who were most willing to serve.”³³¹ He thus championed delegating to Congress the power to set representatives’ salaries. This sentiment strongly suggests that a state’s attempt to reduce its representatives’ salaries by way of fees or other extractions would have run into stiff opposition at the Constitutional Convention.

Perhaps more importantly, the Framers’ principal reason for rejecting ownership as an Article I qualification was their aversion to elitism and wealth, at least in regard to the House of Representatives. According to *Thornton*, the Framers rejected property ownership because it threatened to close government to the common man.³³² Madison wrote in his *Federalist Papers* that “the door of [the House of Representatives] is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.”³³³ This same reasoning would seem to foreclose a requirement that elected officials pay over property as a condition of holding office. Ownership was rejected because it precluded a significant segment of the community from running for office. In order to further this egalitarian goal, at least in terms of the House, the Framers went so far as to trade the financial independence demanded of voters³³⁴ for economic equality among representatives. The same egalitarian philosophy that barred property ownership requirements applies to property extractions.

accompanying text. However, they would not have been familiar with any form of tax charged to candidates.

331. *Thornton*, 514 U.S. at 809-10 (citing Farrand, *supra* note 264, at 216).

332. *Id.*

333. *Id.* at 807 (quoting THE FEDERALIST NO. 52 (James Madison)) (emphasis added).

334. Property qualifications were designed, in part, to insure the independence of voters and representatives. Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353, 386-90 (2003). Before adoption of the secret ballot, a credible fear existed that tenants would be forced to vote in their landlord’s interest. Consequently, the more property one owned, the more tenants he would have, and the more votes he could produce. Property qualifications were thought to solve this problem by disenfranchising tenants and denying landlords multiple votes. The Framers’ concern over equality, however, apparently trumped their concern over *representatives’* independence. *See id.* at 389.

When the question arose as to whether the Constitution should require officials to meet a property qualification so as to assure their personal independence, [Gouverneur] Morris responded that, ‘If qualifications are proper, he [would] prefer them in the electors rather than the elected.’ [James] Madison agreed, and most others would have, also. Even so, there was strong support for property requirements for elected officials as well as voters.

Id. (footnotes omitted).

Extraction, after all, presupposes some measure of ownership.

Some counter this last point by arguing that “a filing fee . . . may be paid by anyone in [the candidate’s] behalf.”³³⁵ Fees are thus unlike property qualifications, or qualifications of any sort. In the words of the Third Circuit, filing fees are “not inherent in the candidate.”³³⁶ Age, residence, and citizenship, after all, must be satisfied by the candidate for office, as opposed to someone else.³³⁷

At the time of the founding, property qualifications commonly demanded ownership that was unrelated to the political purpose to which the property was put. Voters and candidates could not be gifted property simply to facilitate their participation in the electoral arena. Some of the founding states went so far as to require that voters swear their qualifying property was not conveyed to them solely to extend the franchise.³³⁸ One might thus say that ownership in many states was required to be “inherent.”

The reason for this restriction was not so much elitist as it was egalitarian. A principal justification for imposing ownership requirements on electors was the principle of “one man, one vote.” Without the demand of ownership, and because secrecy was impossible without official ballots, landlords could effectively cast the votes of their financially dependent tenants. This risk was avoided by insuring financial independence on behalf of voters. Lest landlords skirt this demand by fraudulently gifting or loaning property to tenants, “true” ownership was almost a necessity.

Because of today’s secret ballots, of course, property qualifications are not needed to reduce the risk of landlords, or anyone else, casting multiple ballots by controlling others’ votes. One might even wonder whether secret ballots would have led states to reject ownership demands altogether at the time of the founding.

Speculation over this matter, however, is unnecessary for the simple reason the Constitutional Convention rejected property ownership of any sort as a condition of holding federal office. The Framers’ rejection of the elitist tendencies of property qualifications admitted no exceptions for

335. See *Fowler v. Adams*, 315 F. Supp. 592, 594 (M.D. Fla. 1970) (noting that a reasonable filing fee for federal office is constitutional because it “is not personal to the candidate” and thus does not constitute an improper qualification).

336. See *Biener v. Calio*, 361 F.3d 206, 212 (3d Cir. 2004) (distinguishing filing fees from “impermissible” additional qualifications).

337. See *Fowler*, 315 F. Supp. at 594 (“The qualifications set forth in Article I, Section 2, Clause 2, must be possessed by the candidate, that is they are personal to him.”).

338. BISHOP, *supra* note 15, at 85.

A great deal of fraud was perpetrated by means of conveyances made in order to qualify electors, in order that they might vote for some particular person [and thus] oaths taken by electors frequently contained a clause declaring that the estate by which the voter was qualified had not been conveyed for this purpose.

Id. Electors and candidates in some colonies and states at the time of the founding thus could not borrow real estate, or even accept it as a gift, in order to participate in the electoral arena.

ownership requirements that would have allowed gifts and loans for purposes of qualifying candidates. Rather, the Framers' interest in equality caused them to reject property requirements outright.³³⁹ Property ownership, however defined, cannot be required of federal representatives.

The Framers' rejection of any distinction between "true" and "borrowed" property drains the *Biener* court's observation of any real significance. The most that can be made from the *Biener* court's observation is that property *differs* from age, citizenship, and residence.³⁴⁰ This rather unremarkable proposition, however, proves little. Unlike age, residence, and citizenship, property has since the founding been subject to exchange and alienation. Property laws may recognize different shades of ownership, but not even long-owned fee simple estates are "inherent" in the same way as age, residence, and citizenship.

That modern candidates can solicit contributions and borrow money to pay fees is likewise irrelevant to the constitutional debate. A filing fee is a filing fee regardless of whether paid from contributions, loans, or personal savings. The same is true of taxes and debts of all sorts.³⁴¹ Financial obligations remain financial obligations regardless of the debtor's sources. Debate over the "inherent" nature of fees is a straw man. It leads nowhere in the constitutional scheme of things.

This is accepted wisdom in the context of voting rights. As both dissents in the seminal voting rights case of *Harper v. Virginia*³⁴² make clear, poll taxes are the historical and functional equivalents of property qualifications.³⁴³ Although property qualifications were preferred at the time of the founding, poll taxes were sometimes substituted to expand

339. See *supra* notes 262-266 and accompanying text (explaining how the Founders decided on the qualifications in Article I, § 2, cl. 2).

340. See *Biener*, 361 F.3d at 212 (arguing that filing fees differ from "impermissible qualifications" because they are "not inherent in the candidate").

341. Consider a hypothetical law student's rationalization of why he did not disclose his many unpaid loans to the state's Board of Bar Examiners: "The loans are not really *my* debts—inherent in me—because anyone can pay them on my behalf." One suspects the Bar's response would sound something like this: "They are still your debts. Whether and how they are paid is your concern. But they remain your debts as far as your creditors are concerned. And the Bar is concerned about your lack of candor." A lawful debt, of course, is not transformed into an unlawful debt or annihilated because a debtor may cajole another to pay it. For this same reason, a fee is not rendered less a fee because the money used to satisfy its terms may be borrowed, gifted, stolen, or raised through campaign contributions. It is still a debt owed by the candidate.

342. 383 U.S. 663 (1966).

343. *Id.* at 674-75 (Black, J., dissenting).

[W]hatever may be our personal opinion, history is on the side of 'rationality' of the State's poll tax policy. Property qualifications existed in the Colonies and were continued by many States after the Constitution was adopted. Although I join the Court in disliking the policy of the poll tax, this is not in my judgment a justifiable reason for holding this poll tax law unconstitutional.

Id.: see also *id.* at 684 (Harlan, J., dissenting) ("Property qualifications and poll taxes have been a traditional part of our political structure.").

voting rights; one who did not own property could pay a tax instead.³⁴⁴ Poll taxes were thus understood to serve as a proxy for the purposes that undergirded ownership requirements.³⁴⁵ In the context of voting rights, the fates of property qualifications and poll taxes have long been understood to fall together.³⁴⁶ One cannot be distinguished from the other.³⁴⁷

Of particular relevance here, modern laws of gifts, debts and campaign contributions do not render poll taxes, which are nothing less than fees for voting, anything less than impermissible property qualifications. It does not matter that the money used to pay a poll tax can be borrowed, gifted, stolen, or raised through contributions. Poll taxes are invalid regardless of whether state laws authorize gifts and loans, or allow others to pay the tax.

For similar reasons, allowing successful candidates to borrow, beg, or steal a state's required office fee would not render it anything less than what it is: a command that property be paid over to the government. How the fee might be raised is irrelevant to its nature and validity. Because office fees require that officeholders *somehow* come into money, they are as much a subset of property ownership as any poll tax, property tax, income tax, or user fee. Their extraction is no less of an interference with property rights than any other tax or fee.³⁴⁸

344. See *supra* note 47.

345. As explained by Justice Harlan in *Harper*, poll taxes and property qualifications shared a common philosophy:

[I]t was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

383 U.S. at 685 (Harlan, J., dissenting).

346. See *Morse v. Republican Party of Va.*, 517 U.S. 186, 229-31 (1996) (plurality) (holding that a delegate fee for party's convention arguably constituted an impermissible poll tax within meaning of federal voting rights laws).

347. The voting rights cases, of course, turned on the meaning of the Equal Protection Clause rather than the Qualifications Clauses of Articles I and II. See, e.g., *Harper*, 383 U.S. at 670 (indicating that wealth and fees bear no relation to one's capacity to vote under the Equal Protection Clause). Still, what is important is the historic and functional commonality between property qualifications and poll taxes. Because of their origins and purposes, it doesn't make sense to distinguish one from the other. The same is necessarily true of fees and ownership requirements for federal office. In the absence of convincing argument to the contrary, their fates ought to be joined under Articles I and II.

348. The Fourteenth Amendment's procedural due process requirements attach to the extraction of taxes and fees. See, e.g., *McKesson Corp. v. Dep't of Bus. Regulation*, 496 U.S. 18, 18-19 (1990) (ruling that, under the Due Process Clause, Florida must provide relief for taxes paid prior to an examination of their "validity"). Hence, the government cannot claim that, because someone else might volunteer to pay them, a person's taxes and fees do not constitute deprivations for purposes of the Fourteenth Amendment's Due Process Clause.

B. The Problem of Size

My assumption to this point has been that *all* extractions of property from federal office holders—as conditions of holding office—are impermissible. It may be, however, that the problem does not admit a single answer. Some fees might constitute property qualifications, while others might not. In particular, large fees may be more easily equated with ownership requirements than trivial ones. Consider, for example, a \$100,000 fee imposed for the privilege of holding congressional office. Because only the wealthiest Americans can afford such a fee, most reasonable people would view it as the equivalent of a property qualification. In contrast, a 1¢ fee bears fewer of the hallmarks of out-and-out property requirements. Perhaps only the former fails scrutiny under the Qualifications Clauses. Extrapolating from this, perhaps only large fees cause qualifications problems.

Constitutional distinctions based on a fee's size have historical support. In striking down the filing fees that emerged at the beginning of the twentieth century as unconstitutional property qualifications, for example, one state court complained about the fee's "enormous" size.³⁴⁹ Because the fee invalidated in that case (two percent of the annual salary for the office)³⁵⁰ was hefty by anyone's standards, it is not clear if a more reasonable, or perhaps trivial, fee would have suffered the same fate.³⁵¹

The problem with this approach lies not at the extremes, but at the margins. What about a \$100 fee? Or a \$1,000 fee? Historically, courts have resolved this sort of problem by turning to the age-old doctrine of "reasonableness." While I confess this approach is plausible in the context of qualifications for federal office, its many uncertainties lead me to question its usefulness. "Reasonableness" under the Equal Protection Clause, remember, has resulted in courts sustaining huge ballot fees.³⁵² A size-based approach risks not only duplicating this result, but also promises what amounts to "a patchwork of state qualifications, undermining the

349. See, e.g., *Johnson v. Grand Forks County*, 113 N.W. 1071, 1075-76 (N.D. 1907) (striking down North Dakota's newly imposed filing fee for primary elections). The court stated:

The charges . . . make the pecuniary ability of the person to pay the same a test as to his qualification to become a candidate for party nomination. The law is as objectionable as if the test was based on a property qualification or the amount the elector had contributed to the public revenues.

Id.

350. *Id.* at 1075.

351. For example, the court noted that it was "not . . . required . . . to pass upon the question of the power of the Legislature to require those submitting their names to be voted for at a primary to pay the expenses of the election." *Id.*

352. See, e.g., *Green v. Mortham*, 155 F.3d 1332, 1339 (11th Cir. 1998) (sustaining Florida's congressional primary ballot fee of seven and a half percent of Congressional salary).

uniformity and the national character that the Framers envisioned and sought to ensure”—just what the Framers sought to avoid according to the Court in *Thornton*.³⁵³

Putting predictions and practicalities aside, a more fundamental objection to a size-based standard rises from the history that surrounded the founding. Ownership requirements at the time of the founding varied widely across the states. South Carolina in 1778, for example, required that members of its state house own real estate valued at no less than £3,500.³⁵⁴ New Hampshire, in contrast, demanded combined estates of personalty and realty worth only £100.³⁵⁵ Delaware and Virginia simply required freeholds, regardless of value.³⁵⁶ Pennsylvania only required that its state representatives be taxpayers, without identifying the amount of the tax or the value of the taxed property.³⁵⁷ No mention was made of these differing property standards at the Constitutional Convention. Instead, property ownership was rejected as a whole.

Constitutional theory likewise makes a size-based approach difficult. Unlike the Equal Protection Clause's analytical continuum, which often weighs state and individual interests,³⁵⁸ the Constitution's structural provisions rarely tolerate balancing.³⁵⁹ Because the Qualifications Clauses

353. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995) (discussing the Framers' vision of the federal government as a "uniform national body representing the interests of a single people").

354. *THORPE*, *supra* note 47, at 70.

355. *Id.* at 68.

356. *Id.* at 70.

357. *Id.* at 69-70.

358. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451-52 (1985) (Stevens, J., concurring) (arguing that the Supreme Court's equal protection decisions "reflect a continuum of judgmental responses to differing classifications," not "sharply defined classifications").

359. The federal government's compelling interest, for example, does not ordinarily justify the invasion of states' rights. *See Printz v. United States*, 521 U.S. 898, 932-33 (1997) (rejecting "balancing" approach in context of a federal invasion of "separate state sovereignty"). Nor does balancing justify violations of separation of power. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (refusing to balance interests and uphold the Balanced Budget and Emergency Deficit Control Act). Similarly, a compelling state interest does not trump the federal government's exercise of its reserved powers. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (stating that, under the Supremacy Clause, Congress may "override" the balance between state and federal interests if it is acting within its constitutional power and if Congress clearly states its preemptive intent). As one federal appellate court explained,

no matter how great the state interest, we should not strain to create ambiguity in a statute where none exists. Accordingly, we ask a single question, is the statute's meaning plain? If so, that ends our analysis, with the result that it must be held that Congress has preempted state law.

Mo. Mun. League v. FCC, 299 F.3d 949, 953 (8th Cir. 2002) (citations omitted). *See generally* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 140-41 (3d ed. 2000). Tribe explained:

[F]or example, the role of the Appointments Clause . . . shows how constitutional text may at times properly be deemed decisive. A pragmatic 'balancing' approach is surely inappropriate 'where the Constitution by explicit text commits the power

are more structural than personal, they too appear to tolerate little (if any) balancing.³⁶⁰ Along these lines, the less-forgiving demands of structural limitations rarely allow incremental encroachments on the Constitution's handiwork.³⁶¹ Lower courts, for example, have struck down durational residence requirements for federal candidates under Article I³⁶² that would clearly have survived analysis under the Equal Protection Clause.³⁶³

The same goes for rotation. The *Thornton* Court was obviously not impressed by the fact that Arkansas allowed *some* incumbents to run again (unencumbered) for federal office.³⁶⁴ Only those who had served three terms in the House, or two terms in the Senate, were excluded from the ballot.³⁶⁵ This restriction on only *some* incumbents was still found to contradict Article I.³⁶⁶ Length of service was simply irrelevant. Whether Arkansas precluded all incumbents from running again, or only those who had served multiple terms, its system of rotation violated Article I.³⁶⁷ Size, one might say, is immaterial.

Although there is apparently no precedent on the point, one might venture to guess that states' incremental *reductions* in qualifications for federal office also violate Articles I and II. A state law authorizing persons who will *almost* be twenty-five-years-old at the time the oath of office is administered, for example, is likely just as unconstitutional as one authorizing newborns to run for federal office. The same likely goes for a state law that authorizes aliens who are *almost* citizens to hold federal

at issue to the exclusive control' of a given branch; in such circumstances the Court has 'refused to tolerate *any* intrusion' by the other branches.

Id. (emphasis added) (quoting *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 484-85, 487 (1989) (Kennedy, J., concurring)) (footnotes omitted). Thus, the balancing that occurs under the Equal Protection Clause is not often applied to the structural rights created under Articles I, II and III.

360. See *Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9th Cir. 2000) ("The [*Thornton*] Court rejected . . . a broad reading of the Elections Clause and held the balancing test inapplicable where the challenged provision supplemented the Qualifications Clause.").

361. By way of comparison, the Supreme Court has invalidated one-year durational residence requirements for voting, see *Dunn v. Blumstein*, 405 U.S. 330, 333 (1972), but sustained a fifty-day durational residence requirement, see *Marston v. Lewis*, 410 U.S. 679, 682 (1973).

362. See, e.g., *Schaefer*, 215 F.3d at 1039 (striking down California's requirement that a candidate for the House of Representatives be a state resident when filing nomination papers); *Hellmann v. Collier*, 141 A.2d 908, 912 (Md. 1958) (invalidating a Maryland requirement that candidates for the House of Representatives reside in their districts).

363. See, e.g., *Marston*, 410 U.S. at 684-85 (reversing the lower court, which relied on Equal Protection to invalidate a fifty-day durational residence requirement for voting).

364. 514 U.S. 779, 784 (1995).

365. *Id.* Those who had served less were not barred from the ballot. One might say that Arkansas's version of term limits was not maximal or complete.

366. See *id.* at 787.

367. Those who fall under an exception may lack standing to challenge the qualification, but those who are precluded from running for office by the requirement have standing to challenge it. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (observing that for a plaintiff to have standing, he or she must experience an injury caused by defendant's conduct which is addressable).

elected office. States cannot incrementally dilute the qualifications found in Articles I and II by authorizing the candidacies of those who are quasi-qualified. "Close enough" may satisfy the Equal Protection Clause, but it will likely not suffice for the structural purposes of Articles I and II.

The better argument then is that because states cannot incrementally subtract from or supplement the qualifications specified under Articles I and II, they cannot start down the path of adding ownership requirements and fees, either. If ownership is a qualification, it is not rendered less so because the property's value is small or trivial. Demanding a little property, like demanding a bit more residence, still violates Articles I and II. Unless one is willing to say that *reasonable* durational residence requirements are consistent with Articles I and II, reasonable property demands must also be deemed invalid. And because fees are nothing more or less than ownership requirements, they too are invalid. Like quasi-rotation, quasi-citizenship, and quasi-residence qualifications, quasi-property qualifications violate Articles I and II.³⁶⁸

C. Comparing Ballot Fees

If fees attached to offices constitute property *qualifications*, pure and simple, then they are obviously impermissible under *Thornton*. The majority in *Thornton* makes clear that states cannot, consistent with Articles I and II, add qualifications of any sort to those already spelled out for congressional and presidential office.³⁶⁹ Even before *Thornton*, lower courts had struck down district residence requirements,³⁷⁰ loyalty oath requirements,³⁷¹ and the exclusion of convicted felons.³⁷² Lower courts following *Thornton* have invalidated stringent residence requirements³⁷³ as

368. Lest one fear that invalidating all fees might wreck the electoral system, consider that the Supreme Court's invalidation of *all* poll taxes and *all* property requirements for voting did not cause any electoral collapse. About one-third of the states today, moreover, survive without charging candidates or officers filing fees. See *supra* notes 153-154 and accompanying text.

369. 514 U.S. at 827 (concluding that states may not expand textually specified qualifications). The dissent in *Thornton* agreed that states cannot add qualifications of any sort under Article II, see 514 U.S. at 861 (Thomas, J., dissenting) (conceding that "individual States have no 'reserved' power to set qualifications for the office of President"), and arguably would have recognized equal protection limitations on the addition of ownership requirements to congressional qualifications. Cf. *Turner v. Fouche*, 396 U.S. 346, 361-64 (1970) (disallowing Georgia freeholder requirement for school board on Equal Protection grounds).

370. See, e.g., *Hellman v. Collier*, 141 A.2d 908, 912 (Md. 1958) (invalidating Maryland district residence requirement).

371. See, e.g., *Shub v. Simpson*, 76 A.2d 332, 341 (Md. 1950) (disallowing Maryland loyalty oath requirement as an impermissible additional qualification).

372. See, e.g., *Application of Ferguson*, 294 N.Y.S.2d 174, 177 (N.Y. Spec. Term 1968) (requiring New York to include otherwise qualified convicted felon on Senate ballot).

373. See, e.g., *Schaefer v. Townsend*, 215 F.3d 1031, 1039 (9th Cir. 2000) (ruling that California cannot require that candidates for the House of Representatives be residents of their district when filing nomination papers).

well as voter registration requirements³⁷⁴ under the Qualifications Clauses. If the state's condition constitutes a *qualification*, then it is invalid pure and simple.

Modern *ballot* fees, however, are not technically conditions of holding office. They instead tend to qualify only ballot access. One who does not or cannot pay the fee will not have her name printed on the state's official ballot. One might still run as a write-in candidate, an independent, or in some other way secure federal elected office. Viewed in this way, ballot fees are like any other procedural device that is used to manage ballots. And because procedural devices, like signature collections,³⁷⁵ are valid, so too are filing fees.³⁷⁶

The argument that ballot fees are permissible procedures as opposed to unconstitutional qualifications is certainly plausible. Article I, after all, expressly delegates to the states the power to regulate the "Times, Places and Manner of holding Elections."³⁷⁷ Article II likewise presupposes a state's power, through its legislature, to prescribe procedures for appointing its allotted "Number[s] of Electors."³⁷⁸ Even though states cannot add qualifications, they clearly have the power, absent congressional pre-emption,³⁷⁹ to prescribe the proper procedures for filling a federal elected

374. See, e.g., *Campbell v. Davidson*, 233 F.3d 1229, 1236 (10th Cir. 2000) (holding that a Colorado voter registration requirement for House of Representatives candidates violates the Qualifications Clause).

375. The Eleventh Circuit in *Cartwright v. Barnes*, for example, concluded that Georgia's signature collection requirement for congressional primaries constituted a permissible *procedure*, rather than an impermissible *qualification*. 304 F.3d 1138, 1139 (11th Cir. 2002).

376. Applying similar reasoning to that found in *Cartwright*, the Third Circuit in *Biener v. Calio* sustained Delaware's \$3,000 filing fee for the Democratic House primary. 361 F.3d 206 (3d Cir. 2004). Because the fee was tied to the primary system, the court found it was designed "to keep Delaware's ballots manageable." *Id.* at 212. Further, the court noted that there was no meaningful way to distinguish the petitioner's argument about filing fees from signature collection and that "the logical consequences of [this] argument would jeopardize states' use of signature requirements." *Id.*

377. U.S. Const. art. I, § 4, cl. 1. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." *Id.* James Madison

illustrated the procedural focus of the Elections Clause by noting that it covered "[w]hether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833 (1995) (citing Farrand, *supra* note 264, at 240).

378. U.S. CONST. art. II, § 1, cl. 2. "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." *Id.*

379. Article I, Section 4 directs that "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4. While Article II, Section 1 provides no similar power, it would seem that Congress also has the authority to regulate the procedures surrounding presidential elections. See, e.g., Oregon

office. If ballot fees are procedures, they would thus seem secure.

The Supreme Court in *Thornton*, however, made clear that the matter of qualifications is not form over substance.³⁸⁰ Qualifications that states camouflage in ballot garb are still qualifications.³⁸¹ The facts of *Thornton* attest to the Court's willingness to look beyond a ballot condition's procedural façade. In *Thornton*, Arkansas did not prevent long-term incumbents from holding federal office.³⁸² Rather, it only excluded their names from official ballots.³⁸³ Because incumbents' names could be written in, Arkansas argued its ballot restriction was not a substantive "legal bar to service."³⁸⁴ Like the primary restrictions sustained in *Storer v. Brown*,³⁸⁵ where California prohibited "sore losers" from running in general elections and required that independent candidates collect signatures to garner space on election ballots,³⁸⁶ Arkansas claimed that the limitation it placed on incumbents was procedural.³⁸⁷ Thus, Arkansas argued that its restriction was no more a qualification than any other electoral hurdle.³⁸⁸

The majority in *Thornton* was not persuaded.³⁸⁹ It worried about states avoiding the strictures of Article I by "dress[ing] eligibility to stand for

v. Mitchell, 400 U.S. 112, 124 (1970) (noting that "it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.") (footnote omitted). Regardless of whether such power exists, Congress has not seen fit to regulate directly the use of ballot fees in either congressional or presidential elections. Instead, it merely requires those states covered by section 5 of the Federal Voting Rights Act to pre-clear any changes to their ballot fees with the Attorney General. See generally *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996) (holding that the Attorney General must pre-clear delegation fees imposed by the Virginia Republican Party).

380. See 514 U.S. at 831 (holding that Arkansas' ballot access restriction was actually a qualification for holding congressional office and therefore it violated the Qualifications Clauses).

381. See *id.* (concluding that states cannot undermine the principles of the Qualifications Clauses by creating allegedly procedural ballot access restrictions).

382. *Id.* at 828.

383. *Id.*

384. *Id.*

385. 415 U.S. 724 (1974).

386. The Court in *Thornton* summarized California's primary law as one that required candidates affiliated with a qualified party to win a primary election, and required independents to make timely filing of nomination papers signed by at least five percent of the entire vote cast in the last general election. The code also denied ballot position to independents who had voted in the most recent primary election or who had registered their affiliation with a qualified party during the previous year.

514 U.S. at 828.

387. *Id.*

388. *Id.*

389. See *id.* at 829 (asserting that Arkansas' amendment was not analogous to the constitutional ballot restriction in *Storer* and instead represented an indirect attempt to violate the Qualifications Clauses).

Congress in ballot access clothing.”³⁹⁰ Cases like *Storer*, it found, merely demonstrated that states could draw up “procedural regulations”³⁹¹ that delineated “*how* these electors shall elect—whether by ballot, or by vote, or by any other way.”³⁹² Hence, states can enact “evenhanded restrictions that protect the integrity and reliability of the electoral process itself,”³⁹³ as well as those designed to “avoid[] ‘voter confusion, ballot overcrowding, or the presence of frivolous candidacies.’”³⁹⁴ Rules that “dictate electoral outcomes, . . . favor or disfavor a class of candidates, or . . . evade important constitutional restraints,”³⁹⁵ in contrast, are impermissible under Article I, Section 4. Substance is crucial. Ballot restrictions, like Arkansas’s,³⁹⁶ that are intended to mimic impermissible qualifications by “handicapping a class of candidates”³⁹⁷ are qualifications nonetheless.

Because Arkansas’ ballot access restriction was “undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses,”³⁹⁸ the majority in *Thornton* had little difficulty concluding that it constituted a qualification.³⁹⁹ “[E]ven if . . . incumbents may occasionally win reelection as write-in candidates, there is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election.”⁴⁰⁰ Arkansas intended rotation and succeeded in handicapping incumbents.⁴⁰¹ The Court easily unmasked this sort of ballot manipulation as a substantive

390. *Id.* (quoting *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 357 (Ark. 1994)).

391. *See Thornton*, 514 U.S. at 832-33 (rebuffing petitioners’ argument that Article I, Section 4, Clause 1 of the Constitution (the Elections Clause) provides states with the power to exclude classes of candidates from federal office and instead finding that the Elections Clause only affords states the authority to create “procedural regulations”).

392. *Id.* at 833 (quoting 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 71 (J. Elliot ed., 2d ed. 1836)).

393. *Thornton*, 514 U.S. at 834 (citation omitted). Rules designed to “maintain[] the integrity of the various routes to the ballot” are generally valid. *Id.* (citation omitted).

394. *Id.* (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986)).

395. *Id.* at 833-34.

396. Arkansas conceded, for the most part, that the “intent behind [it’s restriction was] to prevent the election of incumbents.” *Id.* at 830.

397. *Id.* at 836.

398. *Id.* at 835 (footnote omitted).

399. *See id.* at 836 (asserting that Arkansas’ measure violated the Constitution because it indirectly imposed a qualification for Congress that the Constitution does not establish). The majority correctly dismissed the dissent’s complaint that Arkansas only intended the ballot restriction to “level the playing field.” *Id.* Arkansas may have been trying to level the playing field, but it was doing so to force rotation. For this same reason, the availability of free write-in space to candidates who do not wish to pay a filing fee does not transform the fee into a ballot access procedure. It does not mean that fees are necessarily qualifications either. The most that can be said is that the availability of write-in space does not resolve the matter.

400. *Id.* at 831.

401. *See id.* at 830 n.43 (providing that in over 1,300 Senate elections since 1913 only one write-in candidate has won and in over 20,000 House elections since 1900 only five write-in candidates have won).

qualification rather than an evenhanded procedure.⁴⁰²

Were states to demand ballot fees without allowing candidates any alternative mode of winning election, *Thornton*'s application and result would be clear, at least if one agrees that office fees constitute impermissible qualifications.⁴⁰³ Under such circumstances, ballot fees would in fact be office fees, since no candidate who refused to pay could be elected to office.

Moreover, the offer of write-in space, on either the primary or general ballot, is obviously insufficient to insulate the use of qualifications for ballot access after *Thornton*.⁴⁰⁴ For ballot fees to survive *Thornton*, then, at bare minimum the state must make available a non-monetary alternative that does not make it "significantly more difficult for the barred candidate to win."⁴⁰⁵

The question turns to what alternatives might satisfy *Thornton*'s command. The Third Circuit in *Biener v. Calio*⁴⁰⁶ concluded that Delaware's \$3,000 ballot fee did not constitute an impermissible qualification because Delaware afforded candidates a "choice."⁴⁰⁷ Extrapolating from a previous Third Circuit decision rejecting a Qualifications Clause challenge to the Federal Hatch Act,⁴⁰⁸ which requires that candidates for federal elective office resign from public employment, the court in *Biener* concluded that a "candidate financially able to pay a filing fee, but unwilling to do so, is not being subjected to an impermissible

402. More recently, the Supreme Court in *Cook v. Gralike* employed this same analysis to invalidate Missouri's attempt to inform voters of candidates' opposition to rotation. Missouri sought to place this information on the ballot next to candidates' names. 531 U.S. 510, 514 (2001). The Court concluded that this type of "scarlet letter" was impermissible under Article I. *Id.* at 525-27. Rather than a procedure, it was designed to influence the electoral outcome. *Id.* at 526-27.

403. See *supra* notes 325-349 and accompanying text.

404. The same result can arguably be reached under the Equal Protection Clause. In *Lubin v. Panish*, the Supreme Court invalidated California's primary fee under the Equal Protection Clause, in part, because it also applied to write-in candidates. 415 U.S. 709, 722 (1974). California thus provided no non-monetary alternative. The Court also opined, in dicta, that a free write-in alternative would likewise prove insufficient:

The realities of the electoral process . . . strongly suggest that "access" via write-in votes falls far short of access in terms of having the name of the candidate on the ballot [A]lthough we need not decide the issue, the intimation that a write-in provision without the filing fee . . . would constitute "an acceptable alternative" appears dubious at best.

Id. at 719 n.5.

405. 514 U.S. 779, 831 (1995).

406. 361 F.3d 206 (3d Cir. 2004).

407. See *id.* at 212 (holding that Delaware's filing fee was not a qualification for a candidate who could afford to pay the fee because the candidate could choose whether or not to pay it).

408. See *Merle v. United States*, 351 F.3d 92, 97 (3d Cir. 2003) (rejecting Merle's claim that the Hatch Act violates the Qualifications Clause because it does not bar a potential candidate from running for federal office but instead bars potential candidates from continuing to work as state or federal employees).

wealth requirement.”⁴⁰⁹ After all, both laws “allow[] a citizen a choice.”⁴¹⁰ Distilled to its essence, the *Biener* court concluded that so long as a candidate has a choice, any choice,⁴¹¹ a ballot fee cannot be an impermissible qualification.⁴¹²

Biener’s suggestion that *any* choice allows states to skirt the Qualifications Clauses is certainly questionable. *Thornton*, after all, rejected Arkansas’s claim that the availability of write-in space somehow saved its ballot restriction.⁴¹³ The lesson of *Thornton* is that states, at a minimum, must offer incumbents a realistic chance of winning office.⁴¹⁴ Because the possibility of winning write-in campaigns is clearly not enough, states must allow incumbents *access to the ballot*. Anything less would make it “significantly more difficult” for incumbents to win. This is not to say that all ballot routes must be identical. But it does make clear that routes that render success significantly less likely will not suffice.

Of course, most states today that charge ballot fees provide some sort of non-monetary alternative.⁴¹⁵ Several provide outright waivers for indigents: most authorize signature collection. Are either of these sufficient to insulate ballot fees from attack under the Qualifications Clauses?

Because indigence exceptions by definition are not available to all candidates,⁴¹⁶ they would not seem to offer the realistic alternative *Thornton* demands. For those candidates who are financially able, after all, indigence waivers offer no alternative at all.⁴¹⁷ In *Thornton*, remember,

409. 361 F.3d at 212.

410. *Id.*

411. The only choice *Biener* had, after all, was to pay the fee or not run for office. The *Biener* court’s conclusion that he had a viable choice, *id.*, thus seems to fail under its own terms.

412. The court relied on *Merle*, which sustained the Federal Hatch Act’s “resign to run” law. 351 F.3d at 97. The court in *Biener* observed that “a ‘resign to run’ law may force the prospective candidate to make a choice between federal employment and running for elective office, but does not constitute an ‘additional qualification for the office of United States Representative.’” 361 F.3d at 212 (citing *Merle*, 351 F.3d at 97). The court’s decision in *Merle* is surely correct; “resign to run” laws do not offend the Qualifications Clause. Not because of any choice, but simply because the Framers did not reject this type of limitation. Indeed, the Incompatibility Clause prohibits officers of the United States from serving in Congress. The Framers thus envisioned Hatch Act-type limitations.

413. 514 U.S. 779, 831 (1995) (rebuffing Arkansas’s argument that its restriction is constitutional because write-in candidates have considerably less chances of winning elections).

414. *Id.*

415. See *supra* notes 153-195 and accompanying text.

416. See, e.g., DEL. CODE ANN. tit. 15, § 3103(d), (e) (1999) (limiting the non-monetary alternative to “indigents” who earned less than the qualifying amount for Federal SSI benefits).

417. Even when states make indigence exceptions available to any candidate willing to declare an “inability to pay,” few candidates use them. Georgia’s 1996 congressional elections, for example, saw no candidates use its indigence alternative. See Brown, *supra* note 112, at 1300 n.88 (noting that Georgia required candidates using the state’s signature

incumbents who had not served the stated number of terms, could still appear on Arkansas's ballots.⁴¹⁸ This did not prevent those incumbents ousted from Arkansas's ballot from complaining, nor did it stop the Supreme Court from striking down Arkansas's required rotation.⁴¹⁹ Hence, if fees otherwise constitute qualifications, they cannot be saved by waivers afforded to only some. For non-monetary alternatives to have any chance of rescuing fees, states must make them available to all candidates. Otherwise, those without the choice can bring Qualifications Clause challenges under the logic of *Thornton*.⁴²⁰

Signature collection alternatives made available to all candidates⁴²¹ have the best chance of pushing ballot fees past *Thornton*'s test. Still, in order to offer candidates a true choice, signature collection cannot be made significantly more difficult than paying the required fee. At minimum, *Thornton* would seem to require that the burdens imposed by ballot fees and non-monetary alternatives prove roughly proportional. After all, write-in space failed to impress the majority in *Thornton* because it rendered success substantially more difficult. This increased difficulty made it clear that Arkansas favored rotation over incumbency, so much so that the use of rotation to limit the ballot was the equivalent of a qualification. Likewise, measures that coerce candidates to pay fees to qualify for ballots reflect a clear property preference.⁴²² Assuming that office fees constitute property qualifications,⁴²³ this sort of ballot preference would not seem to survive *Thornton*.

My purpose here is not to attempt a correlation between fees and signatures that demonstrates where dramatic disparities exist.⁴²⁴ (Suffice it

alternative to swear to an "inability to pay"). For a variety of reasons, not the least of which is political viability, candidates understandably shy away from admitting indigence. See generally *Cook v. Gralike*, 531 U.S. 510, 525-26 (2001) (observing that "scarlet letters" can affect electoral outcomes).

418. 514 U.S. at 830.

419. See *id.* at 831 (holding that Arkansas' contested amendment violated the Qualifications Clauses, even though it provided ousted candidates the possibility of a write-in campaign, because it significantly decreased their chances of winning).

420. Further, indigence waivers can be the equivalents of dreaded "scarlet letters," which make it difficult for candidates to win. See *Cook*, 531 U.S. at 525-26 (observing that ballot notations describing candidates' positions on rotation amounted to impermissible "scarlet letters"). Election can be difficult once a candidate has admitted indigence. See Brown, *supra* note 112, at 1300-01 (discussing why candidates rarely want to use indigence exceptions or non-monetary alternatives conditioned on indigence).

421. See *supra* notes 164-165 and accompanying text.

422. This is true regardless of whether the fee is imposed by the state or a party. Ballot fees established or set by either of the two major parties are still subject to constitutional challenge under the Equal Protection Clause, and thus presumably under any other constitutional provision—including the Qualifications Clauses. See *supra* notes 69, 151, 312, 369, and 404 and accompanying text.

423. See *supra* notes 325-369 and accompanying text.

424. See Brown, *supra* note 112, at 1295-96 (searching for rough proportionality between fees and signature collections).

to say that many states that use signature collections as alternatives to ballot fees set the number of signatures much higher than that demanded by states using signature collection alone.)⁴²⁵ Rather than debate where states cross the line from choice to coercion, my argument here is that ballot fees of any sort—even when joined with realistic and reasonable signature collection alternatives—are impermissible under Articles I and II.

I confess that this argument, at first blush, seems ambitious. Ballot fees, after all, have been used for over a century. Still, the logic of *Thornton*, which holds that states cannot use ballots to supplement the qualifications spelled out in Articles I and II, inevitably leads to this result. It is important to note that the Supreme Court in *Thornton* did *not* rule that realistic electoral alternatives for excluded incumbents necessarily would have saved Arkansas's ballot access law.⁴²⁶ It instead stated that "even if . . . incumbents may occasionally win reelection as write-in candidates, . . . an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand."⁴²⁷ Because it was clear that Arkansas sought to achieve an impermissible end—rotation—its ballot restriction would have been invalid notwithstanding realistic alternatives. *Thornton* holds that ballot access laws that are designed to limit *who* holds federal office, as opposed to *how* candidates run for office, are not exempt from Articles I's and II's full reach.⁴²⁸ Thus, a state's attempt at adding qualifications by way of ballot access is invalid even if coupled with reasonable non-qualification alternatives.

In *Thornton*, of course, Arkansas was admittedly interested in preventing incumbents from running.⁴²⁹ It was thus easy to conclude that Arkansas

425. See *id.* at 1302-06 (describing signature level requirements of states that do not alternatively require fees and comparing them with signature level requirements of states that charge fees). California, for example, requires that House candidates collect 3,000 signatures, which dwarfs the 1,000 signature model used by most non-monetary access states. CAL. ELEC. CODE § 8106(a)(2) (West 2003); see Brown, *supra* note 112, at 1305-06 ("[P]ure signature states tend to require substantially fewer signatures [than fee-charging states]. Most [pure signature] states require 1000 or less. Many states require 500 or less. All but one state require less than 1500 signatures.") (footnotes omitted). Florida and Georgia's experiences in 1996 help prove this point. Both of these states charged candidates significant fees. Notwithstanding that candidates were allowed to collect signatures, they almost always paid the fees. See Brown, *supra* note 112, at 1299-1301 (describing Georgia and Florida's experiences prior to 1996). This suggests that the signature collection requirements in fee-charging states are too onerous. Perhaps because of this realization, Florida reduced its signature collection requirement from three percent of the eligible electorate to one percent in 1999. 1999 Fla. Sess. Laws ch. 99-318.

426. 514 U.S. 779 (1995).

427. *Id.* at 831.

428. See *id.* (arguing that ballot access restrictions which limit who can run for Congress would reduce the Qualifications Clauses to a mere formalism).

429. See *id.* (stating that Arkansas' declared purpose for the ballot restriction evaded the Qualifications Clauses).

camouflaged rotation in ballot access garb; it clearly intended the amendment to restrict *who* rather than *how*. Uncovering a dominant purpose behind America's ballot fees, in contrast, is more difficult. States use ballot fees for a host of reasons. In addition to preventing non-propertied candidates from holding federal office, ballot fees produce income,⁴³⁰ deter frivolous candidates,⁴³¹ test candidates' seriousness,⁴³² limit the size of ballots,⁴³³ help minimize voter confusion,⁴³⁴ perpetuate incumbencies,⁴³⁵ facilitate party control of candidacies,⁴³⁶ and discourage minorities from running.⁴³⁷

Of course, states today are not willing to admit to all of these justifications. Admitting to racial or socio-economic animus can prove constitutionally disastrous. Although perhaps not as obvious, so too is claiming the need to raise revenue to finance elections.⁴³⁸ The Supreme Court in *Lubin* and *Bullock* rejected charging fees for fiscal purposes.⁴³⁹ While perpetuating incumbencies is constitutionally permissible, political reasons caution against its use as a justification for ballot fees. Consequently, modern justifications for ballot fees tend to coalesce around deterrence: a need to limit ballot size by deterring frivolous candidates and testing the seriousness of others.

Because these stated objectives mirror those supporting non-monetary access mechanisms, like signature collections, some argue that the lots of both must be considered together. Under this argument, the demise of ballot fees necessarily spells the end of petitions and signature

430. See, e.g., *Bullock v. Carter*, 405 U.S. 134, 147-48 (1972) (explaining that Texas argued its fees were necessary to defray the costs of elections); see Brown, *supra* note 112, at 1298-99 (discussing Florida's reasons for charging fees including "raising revenue to support various electoral projects").

431. See, e.g., *Lubin v. Panish*, 415 U.S. 709, 714 (1974) (describing California's reason for charging fees as deterring "frivolous or otherwise nonserious candidates").

432. See, e.g., *Bullock*, 405 U.S. at 144-45 (noting Texas's reason for charging fees as limiting ballots to serious candidates).

433. See, e.g., *Green v. Mortham*, 155 F.3d 1332, 1337 (11th Cir. 1998) (observing that Florida's interest in regulating and limiting its ballot justified its fee).

434. See *Lubin*, 415 U.S. at 715 (stating that states have an interest in using fees to avoid voter confusion); *Storer v. Brown*, 415 U.S. 724, 732 (1974) (accepting that states have a legitimate interest in limiting the ballot size to help avoid voter confusion).

435. See Brown, *supra* note 112, at 1307 (stating that a "more subtle argument, and one not often freely conceded, is that ballot access limitations perpetuate incumbency").

436. See *supra* notes 87-90 and accompanying text (noting that parties favored large fees to foster their control over newly created primaries).

437. See *supra* note 126 (discussing Louisiana's racially charged reasons for adopting primaries and authorizing ballot fees).

438. The Court in *Lubin* and *Bullock* rejected the use of fees for financial gain. See *supra* notes 145-152 and accompanying text.

439. *Lubin*, 415 U.S. at 713, 716-18 (rejecting state interest in charging fees to cover costs of elections); *Bullock*, 405 U.S. at 147-49 (rejecting Texas's argument that filing fees were necessary to pay for the costs of administering the primaries so that it did not have to burden taxpayers (voters) with the costs).

collections.⁴⁴⁰ Only caucuses and conventions would remain. This concern, however, is grossly exaggerated. Fees are problematic because they bear all of the hallmarks of property qualifications. Signatures, in contrast, have little in common with property. Sure, candidates can use money to facilitate signature collection. But outside the actual signing of a petition or casting of a vote, this is true with any non-monetary condition. Like it or not, property is power. It allows candidates to run advertisements and connect with their electorates. None of this proves that signatures and money are fungible or interchangeable.⁴⁴¹

More importantly, non-monetary nominating procedures, unlike property qualifications, were recognized and embraced by the Founding generation. The Framers demonstrated this through the creation of the Electoral College⁴⁴² and the not uncommon use of pre-election exclusion procedures.⁴⁴³ Both processes required that candidates obtain votes in preliminary stages before proceeding to a more general election. Gathering signatures is more like garnering votes than it is owning property.⁴⁴⁴

Assuming the best intentions on behalf of fee states, the true constitutional question is simply whether a qualification, such as owning property or possessing the capacity to pay a fee, can be used to deter candidates. If not, can qualifications like these be used in conjunction with some non-qualification alternative to achieve this same goal? The answer, I believe, is “no” on both counts. Resolution of the first problem posed is easy. Allowing states to use otherwise impermissible qualifications to limit ballots by deterring candidates would eviscerate the Qualifications Clauses. Qualifications, by definition, limit the electoral field. They necessarily discourage and deter. Like paying a fee, forcing candidates to purchase

440. The Third Circuit in *Biener v. Calio*, for example, fretted over this proverbial slippery slope: “the logical consequences of Biener’s argument would jeopardize states’ use of signature requirements.” 361 F.3d 206, 212 (3d Cir. 2004).

441. The same is true of other ballot limitations that are not specifically tied to property. “Sore loser” laws, for example, are not impermissible under the Qualifications Clauses, and are not impacted by my thesis. *See, e.g., Van Susteren v. Jones*, 331 F.3d 1024, 1027 (9th Cir. 2003) (sustaining California’s requirement that candidates in party primaries cannot be affiliated with other parties for one year). Justice Thomas’ complaint in *Thornton* that the majority’s Qualifications Clauses analysis threatened to “open up whole new vistas for courts,” including challenges under the Qualifications Clauses to campaign finance, redistricting, and racial discrimination, appears to be the proverbial parade of horrors. 514 U.S. 779, 925-26 (1995) (Thomas, J., dissenting).

442. *See supra* notes 75-78 and accompanying text.

443. *See supra* notes 73-81 and accompanying text.

444. True, candidates can hire agents to collect signatures, which means that to some extent signature collections and money can be exchanged. *See Meyer v. Grant*, 486 U.S. 414, 428 (1988) (holding that supporters and candidates have a constitutional right to hire petition circulators to collect signatures). But this is often the case with money; it can make any task easier. This does not mean, however, that votes and dollars are fully interchangeable. Although a voter can hire a chauffeur to take him to the voting place, he cannot hire the chauffeur to cast a vote.

real estate in order to qualify for official ballots would certainly deter some and seriously test others. It appears safe to say, however, that *Thornton* precludes states from using impermissible qualifications in this manner.

The second question demands more attention, but leads to the same answer. Because *Thornton* did not involve a realistic alternative, incumbents in Arkansas had no real choice. When candidates *are* given a free choice between property and procedure, the argument goes, no qualification is being added to Article I. Only *necessary* conditions, after all, constitute true qualifications. So long as candidates can freely choose either the additional qualification or a procedural alternative, the Constitution has no complaint. Because procedures can be imposed anyway, a property option is a favor to candidates. Those who freely choose the option have voluntarily waived their Article I objections.

The response to this argument is threefold. First, it wrongly assumes that structural guarantees found in Articles I and II are subject to individual control. The Court has often observed that because the Constitution's structural limitations "serve institutional interests that [individuals] cannot be expected to protect," "notions of waiver and consent cannot be dispositive."⁴⁴⁵ What is important is the Framers' choice, and not that of individual candidates.

Second, it ignores the fact that governmental favors extended to particular classes of candidates are objectionable under *Thornton*. Waiving procedural requirements for propertied candidates is just such a favor.

Last, the "free choice" argument proves too much. If accepted—if states can add qualifications that were rejected by the Framers by offering procedural options—no clear logic would appear to prevent them from using a similar technique to *subtract* qualifications the Framers demanded.⁴⁴⁶ That one problem involves a constitutional floor and the other a ceiling is a distinction without a difference. The Qualifications Clauses' requirements are fixed either way according to the majority in *Thornton*.⁴⁴⁷ Because the Qualifications Clauses' demands are both minimal and maximal as far as the states are concerned, precluding a constitutionally qualified candidate from running would appear no more or less proper than allowing a constitutionally unqualified candidate to run.

445. *See* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) ("When these Article III limitations [on the separation of power] are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.").

446. For example, a state might condition congressional ballot access on a candidate's either being a resident (Article I's minimal demand, *see, e.g.*, U.S. CONST. art. I, § 2, cl. 2 (providing three qualifications for House candidate: he or she must be at least twenty-five years of age, a citizen of the United States for at least seven years, and a resident of the state he or she represents)), or collecting 1000 signatures from registered voters.

447. *See supra* notes 282-301 and accompanying text.

Articles I and II prohibit both possibilities. Unless one is willing to conclude that the Qualifications Clauses are more concerned about minimal qualifications than maximal qualifications, a distinction *Thornton* was not willing to draw, the existence of options should thus validate both additions and subtractions, or neither.⁴⁴⁸

Of course, few would be willing to allow states to subtract from the Qualifications Clauses' commands in this manner. The Supreme Court in *Thornton* may have disagreed over Arkansas' authority to add qualifications, but all of the Justices agreed that states cannot subtract from Article I's minimal age, residence, and citizenship requirements.⁴⁴⁹ It is thus difficult to imagine allowing states to convert these minimal qualifications into mere options. Because subtractions via choices cannot be countenanced, neither can additions. Regardless of whether realistic and reasonable non-monetary alternatives are allowed, ballot fees for federal office violate Articles I and II.

CONCLUSION

I recognize that filing fees are preferred by candidates and bureaucrats in many states because of their relative ease and convenience. Even though signature collection is a more precise mechanism for screening out frivolous and testing serious candidates, filing fees enjoy the benefit of administrative efficiency. Administrative ease, however, seldom justifies overriding important rights. Nor is it a sound basis for circumventing the Constitution's structural guarantees. Like it or not, the Framers felt that property was irrelevant to a person's ability or capacity to hold federal elected office. Whether viewed as an individual right or structural

448. Even should a state cast a fee as an option instead of a command—for example, “one thousand signatures are required, but in recognition of the fact that candidates often hire signature collectors, one can always just pay a \$3,000 filing fee”—the resulting choice must prove invalid. Consider another example, a state law that requires congressional candidates to collect signatures, but allows candidates who reside in the district—an otherwise impermissible qualification—an automatic place on the ballot: “one thousand signatures are required for ballot access, but in recognition of the fact that district residents are better known, they automatically qualify.” Such a choice is surely invalid. Regardless of which one is deemed a command and which one is offered as an alternative, the choice is still between an impermissible qualification and a permissible procedure. It is no different from saying that district residence is required in the absence of collecting 1,000 signatures. Unless one is willing to sustain such a requirement, courts must also rule that a choice between fees and signatures is invalid.

449. See *Thornton*, 514 U.S. at 869 (Thomas, J., dissenting). Justice Thomas argued: The Qualifications Clauses do prevent the individual States from abolishing all eligibility requirements for Congress [T]he people of each State need some guarantee that the legislators elected by the people of other States will meet minimum standards of competence. The Qualifications Clauses provide that guarantee: They list the requirements that the Framers considered essential to protect the competence of the National Legislature.
Id. (footnote omitted).

guarantee, this constitutional conclusion should not be circumvented by appeals to bureaucratic necessity.

Though I confess a lack of empirical data proving this point, I suspect that ballot fees discourage a larger percentage of “have-nots” than “haves” from running for federal office.⁴⁵⁰ This unfortunate tendency is detrimental not only to the deterred candidates, but also to the American political system. Who knows what candidates and ideas might emerge from a free political market? It may be that a property-poor candidate has the innate wisdom and political acumen to solve the nation’s budget woes. Or perhaps another Lincoln would emerge to unite a divided country. America is worse off, I believe, if ballot fees keep even one property-poor candidate from maximizing his or her talents in the political arena.

A common response to my Lincoln suggestion is that surely this sort of candidate, if truly motivated, would gather the needed property (or propertied support) to satisfy a fee requirement. Lincoln, after all, only started poor. By the time he won election to Congress (and again to the White House) he was a successful, propertied lawyer.⁴⁵¹ The argument, I think, is short-sighted. It ignores the fact that “[w]e are rarely smart enough to set about on purpose making the discoveries that will drive our economy and safeguard our lives.”⁴⁵² Achievements, instead, are quite often inadvertent, accidental and unconnected to wealth.

The late Carl Sagan used the life and discoveries of James Clerk Maxwell to illustrate this point.⁴⁵³ Maxwell, who was born in Scotland in 1831,⁴⁵⁴ was instrumental to our current understandings of electrical and magnetic vectors,⁴⁵⁵ without which our present mechanical gadgetry, like the computer on which this Article was prepared, would not operate. Sagan points out that even the world’s most wealthy nation, with its government’s vast store of scientists and resources, could not have willed Maxwell’s discoveries: “If Queen Victoria had ever called an urgent

450. In an empirical study I conducted a decade ago, I discovered that States charging more than \$1,336 to run for congressional (House) office had less than half of the candidates found in States charging \$100 or less. See Brown, *supra* note 112, at 1312 tbl. 1 (illustrating that in the 1994 and 1996 congressional elections states charging more than \$1,336 to run for office had 1.56 candidates per primary versus 3.31 candidates per primary for states charging less than \$100 to run). I am thus convinced that ballot fees deter candidates. Whether these deterred candidates are more or less affluent is anyone’s guess. Simple reason, however, suggests that they would tend to be less affluent.

451. See DAVID HERBERT DONALD, LINCOLN 111-15 (1995) (describing Abraham Lincoln’s election to the Thirtieth Congress as a Whig from Illinois).

452. CARL SAGAN, THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK 397 (1996).

453. See *id.* at 385 (detailing James Clerk Maxwell’s natural scientific acumen, beginning at the age of two when he used a tin plate to bounce an image of the sun off furniture).

454. *Id.*

455. *Id.* at 393.

meeting of her counselors, and ordered them to invent the equivalent of radio and television, it is unlikely that any of them would have imagined the path⁴⁵⁶ Like it or not, money alone cannot uncover truth. Money may be a facilitator of sorts—everyone, after all, must eat—but society should not rely upon it as a great gatekeeper of knowledge and ideas.

Meaningful discovery flows from talent, curiosity, and hard work. Money is important, but it should not be a fixation. When it is, when government corrupts all scientists with promises and demands of riches, the likes of Maxwell might be lost.⁴⁵⁷ Similarly, people can not expect political truth and progress to flow exclusively from America's financial faucet. Telling political candidates that they must have (or raise) a fixed sum of money to be credible enough to enjoy the privilege of running for office is akin to legislating scientific discovery. Both interfere with the free marketplace of ideas. Neither works.

I suspect that critics will fret over the demise of ballot fees. Without fees, after all, loons will run for office, ballots will explode, and ordered government will collapse. Truth be had, none of these horrors is likely. About one-third of the states presently rely on non-monetary means to restrict their ballots,⁴⁵⁸ and to my knowledge none of these has experienced debilitating electoral problems. In fact, the volume of candidates who run in House primaries, on average, is not noticeably different in fee and signature states.⁴⁵⁹

Far from disaster, an end to ballot fees offers several salutary

456. *Id.* at 394. Sagan continues: "Meanwhile, on his own, driven only by curiosity, costing the government almost nothing, himself unaware that he was laying the ground for the Westminster Project, 'Dafty' [Maxwell] was scribbling away." *Id.* Not only did Maxwell not know where his studies might lead, had the government known it "would have been telling him what to think about and what not, impeding rather than inducing his great discovery." *Id.*

457. Sagan comments:

Members of Congress and other political leaders have from time to time found it irresistible to poke fun at seemingly obscure scientific research proposals that the government is asked to fund. . . . I imagine the same spirit in previous governments—a Mr. Fleming wishes to study bugs in smelly cheese; a Polish woman wishes to sift through tons of Central African ore to find minute quantities of a substance she says will glow in the dark; a Mr. Kepler wants to hear the songs the planets sing.

Id. at 398. He concludes:

These discoveries and a multitude of others that grace and characterize our time, to some of which our very lives are beholden, were made ultimately by scientists given the opportunity to explore what in their opinion, under the scrutiny of their peers, were basic questions in Nature Fundamental research, research into the heart of Nature, is the means by which we acquire the new knowledge that gets applied.

Id.

458. See *supra* notes 154-156 and accompanying text.

459. See Brown, *supra* note 112, at 1312-13 tbls. 1, 2 (demonstrating that, on average, about 1.9 candidates run in each House primary in fee states and 1.8 candidates run in each House primary in signature states).

possibilities. First, signature collection requirements in those states that currently rely on ballot fees will likely be reduced. States that eschew fees commonly require far fewer signatures than those that do not, and an end to ballot fees will force states to reconsider seldom-used, non-monetary access mechanisms. Once incumbents are turned to non-monetary access—and discover that collecting hundreds and thousands of signatures is hard—the number of signatures required throughout the United States will be reduced. Second, while an end to ballot fees will not necessarily increase the raw number of candidacies, it will lead to a larger percentage of non-affluent, property-poor challengers. This then will lead to the most important development, a more complete (and competitive) cross-section of ideas in the political marketplace.